IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]115

JOSIE C. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, PLAINTIFF IN ERROR,

vs.

BAKER, ECCLES & CO. AND AUGUSTA H. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, DEFENDANTS IN ERROR.

REPLY BRIEF OF DEFENDANTS IN ERROR.

CHARLES K. WHEELER,
Of Paducah, Kentucky,
Attorney of Record for Defendants in Error.

DANIEL HENRY HUGHES,
JAMES GUTHRIE WHEELER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 439.

JOSIE C. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, PLAINTIFF IN ERROR,

vs.

BAKER, ECCLES & CO. AND AUGUSTA H. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, DEFENDANTS IN ERROR.

REPLY BRIEF.

Counsel for plaintiff in error says:

> "The material facts now for consideration are not those tending to establish *where the domicile was,* but are those only which relate to the competency of the forum undertaking to decide that question, and these are not in controversy."

And again:

> "Assuming the death of an intestate owning personal property in several States and a lawful administrator in a State where the intestate died and some of the next of kin reside * * * can a court * * * in such State, having general jurisdiction * * * in a suit brought by the lawful personal representative finally adjudge and determine the place of domicile of the intestate at the time of death so as to include next of kin residing in other States and made parties by publication?"

A circuit court in Kentucky determined "where the domicile was" in a suit brought by the lawful administrator in a State where "the next of kin reside" and where a substantial part of the personal property of the intestate is situated, and the judgment of the Kentucky court determining "where the domicile was" was rendered before the Tennessee court adjudged or determined that question. The Court of Appeals of Kentucky affirmed the judgment of the circuit court determining "where the domicile was," and that is the ruling complained of. The argument is that the Court of Appeals of Kentucky should have ignored a judgment of a circuit court of that State and have adopted the conclusion of the Tennessee chancery court finding "where the domicile was," notwith-

standing the prior decision of the Kentucky circuit court.

The appellate court says:

> "For the reasons stated we think the judgment dismissing the petition of Mrs. Josie C. Baker should be affirmed, as the effect of the order of dismissal was to adjudge that Charles Baker died a resident of Kentucky, and therefore his mother was entitled to one-half of his surplus personal estate in this State and his widow to the other one-half.
>
> "It is true the judgment appealed from did not so decree, but it is evident that the circuit court merely dismissed the petition instead of entering such a judgment, because it was of the opinion that the judgment rendered in the suit of Mrs. Augusta Baker, as administratrix, against Mrs. Josie Baker sufficiently determined the rights of the parties and it was unnecessary to again adjudge the matter."

And the opinion further directs what judgment shall be entered upon a return of the case to the circuit court.

It was suggested below that Mrs. Josie Baker was not served with process nor brought before the court by proper warning order, and therefore the judgment rendered in the case of Mrs. Augusta H.

Bakre, administratrix, *vs.* Baker, Eccles & Co. and Mrs. Josie C. Baker and others was not only void as to her, but was a nullity for any purpose. The Court of Appeals held it void as to the plaintiff in error for the reason stated, but disallowed the residue of the contention. As to all parties defendant served with process the judgment in that case is effective and binding. The plaintiff in error not being bound by the judgment had the legal right to, and she did have the question of where the domicile was reconsidered in this action commenced by her in the Kentucky courts.

It is argued that if a man died leaving personal property and distributees in several States, and a lawful administrator is appointed in one of them, that in an action by such administrator, if the resident distributees are served with a process and the non-residents are properly before the court by warning order, a court of general jurisdiction can adjudge "where the domicile was" so as to include every one everywhere.

Let us carry the assumption further and assume that after judgment in such a suit "the lawful administrator" goes into another State and finds a suit by "the lawful administrator" against the distributees named in the first suit, and other local distributees, not parties to the first suit, but who are served with process in the latter action, and in which latter action a court of general jurisdiction in such State had determined the domicile to be in such last-named State. Now, according to plaintiff

in error the distributees served with process, or properly warned in the first suit, are bound by the judgment therein. They are likewise bound by the judgment in the second suit, as are also the local distributees served with process in said second suit. Now under the law of the first State the father and mother are the only distributees of an intestate, while the children only are distributees under the laws of the latter State. Which judgment will prevail and how will the intestate's property be distributed?

"The confusion" feared by opposing counsel will be worse confounded if his idea is to prevail. As the law is written a man is not bound by the judgment of a court unless served with personal process, nor is his property affected by such a judgment unless it be within the jurisdiction of the court pronouncing judgment. These are elementary and fundamental principles, not to be obscured by bewildering "assumptions" or artful sophistry. The very essence of our jurisprudence is a circumscribed judicial orbit and a right to be heard. Abandon these legal buttresses and we are confronted by arbitrary power which by right belongs to no tribunal.

> "No court can acquire jurisdiction, either of person or property, simply by holding that it has jurisdiction."
>
> Calhoun *vs.* Bryan, 133 N. W., 266.

It is admitted there is no precedent for the rule sought to be established, but it is contended that the complexities of an advancing society demand that you "dim" State lines, ignoring all the while that it is law and not lines sought to be dimmed. "Such (this) a proceeding is not one *in rem.*" "Neither is it an action *in persona* against the distributees." Nevertheless, if this "proceeding" is to operate against defendant in error at all it must be by estoppel—estoppel by judgment, and if there be no judgment there is no estoppel.

"The judgment of the court upon the facts determined the domicile, and that once determined the law decrees the consequence upon the property." However, before the facts of domicile can be determined the fact of jurisdiction must exist, for, if wanting, any "determination" is *coram non judice.*

There is no bill of evidence in the record, and I assume this court will accept the conclusion of facts found by the court of appeals of Kentucky, so perhaps it is not necessary to combat the statement of counsel in relation to the facts.

For the reasons stated herein and in the original brief, I respectfully submit that the motion should prevail.

CHAS. K. WHEELER,
Attorney of Record for Defendants in Error.

D. H. HUGHES,
J. G. WHEELER,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. ~~935~~. [redacted]115

JOSIE C. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED,

PLAINTIFF IN ERROR.

vs.

BAKER ECCLES & CO., AND AUGUSTA H. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED,

DEFENDANTS IN ERROR.

IN ERROR TO COURT OF APPEALS OF KENTUCKY.

CHARLES K. WHEELER,
Of Paducah, Kentucky,
Attorney of Record for Defendants in Error.

DANIEL HENRY HUGHES,
JAMES GUTHRIE WHEELER,
OF COUNSEL.

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Cobb vs Haynes, 8 B. Monroe, 137,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 936.

JOSIE C. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, PLAINTIFF IN ERROR.

vs.

BAKER ECCLES & CO., AND AUGUSTA H. BAKER, INDIVIDUALLY AND AS ADMINISTRATRIX OF CHARLES BAKER, DECEASED, DEFENDANTS IN ERROR.

IN ERROR TO COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM JUDGMENT OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendants in error, Baker, Eccles & Company, and Mrs. Augusta H. Baker, individually, and as administratrix of Charles Baker, deceased, by their attorney of record herein, and move this honorable court:

First: To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second: To affirm the judgment of the Court of Appeals of Kentucky on the ground that it is manifest that this writ of error was taken for delay, only, and that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument, having been repeatedly decided by this court contrary to the contentions of the plaintiff in error.

Third: To transfer this cause for hearing to the summary docket, if this court should decline to dismiss or affirm, because the case is of such a character as not to justify extended argument.

CHARLES K. WHEELER,

Of Paducah, Kentucky,

Attorney of Record for Defendants in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendants in error will, on the 11th day of October, 1915, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including the opinion of the Court of Appeals of Kentucky and assignments of error filed by you in this cause, all of which is now served upon you herewith.

CHARLES K. WHEELER,

Of Paducah, Kentucky,
Attorney of Record for Defendants in Error.

Copy of the foregoing motion and notice, together with statement of facts, points and authorities, argument and appendix, received this 5th day of August, 1915.

C. C. GRASSHAM,
Of Paducah, Ky.

JOHN A. PITTS,
Of Nashville, Tenn.

E. W. ROSS,
Of Savannah, Tenn.
Attorneys of Record for Plaintiff in Error.

II.

PLEADINGS.

On the 28th day of December, 1912, Josie C. Baker, individually and as administratrix of Charles Baker, deceased, filed an original bill of complaint in the Hardin County, Tennessee Chancery Court against E. W. Baker and Mrs. Augusta H. Baker, of Paducah, Kentucky; J. W. Tackett, Jesse Barnes, Fayette Barnes, and G. L. Barnes, administrator of C. R. Barnes, residents of Hardin County, Tennessee; and the First National Bank of Savannah, Tennessee, wherein she sought to have dower assigned to her as the widow of Charles Baker in lands owned by her husband in Tennessee; to have declared invalid the life estate of Mrs. Augusta H. Baker in a portion of said land, to collect debts due her husband, and to have her rights in the personal estate of her husband fixed and determined. The defendants, E. W. Baker and Mrs. Augusta H. Baker were not served with personal process, nor did they enter their appearance to the action, either in person or by attorney. They were, however, brought before the Court by constructive service or warning order, in accordance with the laws of the State of Tennessee. The case progressed to judgment and the Tennessee Court determined that the domicile of Charles Baker, at the time of his death, was in Hardin County, Tennessee; that his widow, the plaintiff in error, was, under the laws of the State of Tennessee, entitled to all of his personal estate in Tennessee and also all of the personal estate of said decedent in the State of Kentucky.

On the 25th day of November, 1912, the County Court of Hardin County, Tennessee, appointed the plaintiff in error administratrix of the estate of Charles Baker, deceased, and in the order appointing her administratrix, adjudged and determined

that said decedent was a resident of Hardin County, Tennessee, and thereupon she executed bond and proceeded to administer the estate of her decedent. The action of the Chancery Court, referred to, was based upon the appointment of the plaintiff in error as administratrix of Charles Baker, deceased, insofar as it sought to determine the devolution of his personal estate, and to fix the rights of the plaintiff in error therein.

On the 1st day of September, 1914, plaintiff in error commenced her action in the McCracken Circuit Court against the defendants in error, Baker, Eccles & Company. She alleged that she was a citizen of the State of Tennessee; that her husband, Charles Baker, died September 1, 1912, intestate, in that state, owning real and personal property therein; that she had been appointed administratrix of his estate by the County Court of Hardin County, Tennessee, and had qualified and acted as such; that he left no children; that she, as his surviving widow, was his sole distributee, and entitled to all his personal estate. She then by averment set forth the action brought by her in the Chancery Court of Hardin County, Tennessee, and the judgment of said court in said action, and exhibited with her petition, an exemplified copy of the proceedings had in the Hardin County Court, and the proceedings had in the Chancery Court of Hardin County, Tennessee. The defendants in error, Baker, Eccles & Company answered the notice of said suit and denied that Charles Baker died a resident of, or domiciled in the State of Tennessee, and averred that he was at the time of his death a resident of and domiciled in the State of Kentucky, and likewise denied jurisdiction of the County Court of Hardin County, Tennessee, to appoint the plaintiff in error administratrix of said decedent's estate, or that his estate rightfully or could be distributed or settled in accordance with the laws of the State of Tennessee, and averred

that the certificate for 270 shares of the stock owned by Charles Baker at the time of his death in the corporation of Baker, Eccles & Company, was at such time in the State of Kentucky, but that after his death it was wrongfully taken possession of by the plaintiff in error, and by her carried to the State of Tennessee. It likewise averred that at the time of the fiilng of said action, the said Charles Baker owned no stock in such corporation, because by judgment of the McCracken Circuit Court, it had been required to, and had cancelled, all certificates of stock owned by Charles Baker at the time of his death and re-issued one-half to plaintiff in error, and the other half to Mrs. Augusta H. Baker, the mother of said decedent. It denied that the County Court of Hardin County had full or any jurisdiction of the personal estate of said decedent, and it denied that the Chancery Court of Hardin County had either jurisidiction of the subject matter or of the person of said defendant in error, Baker, Eccles & Company.

The Defendant in error, Mrs. Augusta H. Baker, filed her petition in this action, asking to be made a party thereto, and averred that she was the mother of the decedent, Charles Baker; that he resided in, and was a resident of McCracken County, Kentucky for twelve years prior to his death; that he died intestate, leaving no children; that under the laws of this State, his personal estate descended, one-half to her and the other half to his widow, the plaintiff in error; that plaintiff in error resided with her husband in Paducah, Kentucky, and left said State after the death of her husband; that after three months had passed, plaintiff in error, who was first entitled to administer the estate of said decedent, having failed or refused to ask for such administration, she applied for, and was granted letters of administration upon said decedent's estate; that upon her appointment, she caused said estate to be ap-

praised, and thereafter, filed her suit in the McCracken Circuit Court to settle said estate, in which action she made the plaintiff in error a party defendant, and likewise the defendants in error, Baker, Eccles & Company parties defendant thereto; that said action progressed to judgment and it was determined and decreed by the McCracken Circuit Court that the stock owned by Charles Baker, in Baker, Eccles & Company at the time of his death, rightfully belonged, one-half to the plaintiff in error, and the other half to her, as did the other personal property of said decedent, consisting of several thousand dollars in money; that Baker, Eccles & Company were directed by said judgment to cancel all certificates of stock held by said decedent, and re-issue the same in accordance with the decree of the court. In a separate paragraph, she controverts the allegation contained in the petition of the plaintiff in error, as to the residence of said decedent, and denied that the County Court of Hardin County, Tennessee had jurisdiction or authority to decree or adjudge the plaintiff in error, as the surviving widow of the decedent, was entitled in her own rights to all or any of the personal estate of the decedent, or to adjudge or determine that she could receive or hold as her individual property, all or any of said surplus personally, or that it had jurisdiction or authority to direct her to transfer any of his personal property, or that she was entitled under such judgment to sell any of said decedent's personal property; she denied that the Chancery Court of Hardin County, Tennessee, had jurisdiction over her person or of the subject matter of the action, and averred that said court had no jurisdiction or power to determine that Charles Baker, was at the time of his death a citizen of the State of Tennessee, or domiciled therein, and that its judgment and decree in so determining was void and of no effect; that it had no jurisidiction to determine that the plaintiff in error was the

sole distributee, or entitled to all of the personal estate of said decedent, and she exhibited with her answer, copies of the orders of the McCracken County Court appointing her administratrix of the estate of Charles Baker, and likewise an exemplified copy of the judgment of the McCracken Circuit Court, determining and fixing the rights of the defendant in error to administer the surplus personalty of said decedent.

Afterwards, on the 26th day of September, she filed an amended petition to be made a party, setting forth with particularity that she did not enter her appearance in the suit of the plaintiff in error in the Chancery Court of Hardin County, Tennessee; that she did not appear either by attorney or in person, or by any written pleading; she averred that the judgment of said court, and all of its proceedings, so far as she was concerned, were null and void; that she was not present at the time the plaintiff in error was appointed administratrix of the estate of said decedent by the County Court of Hardin County, Tennessee; that she was not served with summons, or notice, advising her that letters of administration would be, or had been granted to plaintiff in error upon the estate of such decedent; that she did not know thereof until after such appointment was made.

On the 25th day of October, 1913, plaintiff in error filed an amended petition in the McCracken Circuit Court, setting forth certain statutes of the State of Tennessee, relating to the descent and distribution of personal property, the probating of wills and the granting of letters testamentary, and the devolution of personal property as fixed by the laws of that State, and also filed as an exhibit with said amended petition, the local rules of practice in the Chancery Courts of Tennessee.

On the 27th day of October, plaintiff in error filed a second amended petition, in which she asked

that Mrs. Augusta H. Baker, individually, be made a party defendant to the action, and averred that she had no right or interest in any of the property or the proceeds thereof, involved in the action; that it all belonged to the plaintiff, as set forth in her original petition; that Mrs. Augusta H. Baker was claiming a right to, or interest in the property and its proceeds, and for that reason, should be a party defendant; that Mrs. Augusta H. Baker was a party defendant; duly and regularly summoned in the action brought by the plaintff in error in the Chancery Court of Hardin County, Tennessee; that said court was one of general and superior jurisdiction; that the rights of property were involved in said action, as between plaintiff in error and Mrs. Augusta H. Baker, and that she was concluded by the judgment of said court, determining and adjudging that said plaintiff in error was entitled to all of said property.

A reply was filed to the answer of Baker, Eccles & Company, controverting the affirmative allegations thereof, and in the third paragraph, alleging that plaintiff in error was never a party to the action in the McCracken Circuit Court brought by Mrs. Augusta H. Baker, administratrix of Charles Baker, deceased; that no warning order was made against her; that she was not before the court by service of summons, and the judgment as to her was void.

An answer was filed by plaintiff in error to the intervening petition of Mrs. Augusta H. Baker, administratrix of Charles Baker, deceased, and the affirmative allegations of said petition controverted, and in a separate paragraph, she averred that she was not a party to the action in the McCracken Circuit Court brought by Mrs. Augusta H. Baker, administratrix of Charles Baker, deceased; that no affidavit or warning order was made to bring her before said court by publication, and that the judg-

ment was void, so far as she was concerned, and a copy of the judgment and the proceedings of the McCracken Circuit Court were attached to such answer.

The defendant in error, Mrs. Augusta H. Baker, by reply, controverted the affirmative allegations of the answer to her intervening petition.

The defendant in error, Baker, Eccles & Company, likewise by rejoinder, controverted the affirmative allegations of the reply to its answer.

There was an agreement between counsel that the affirmative allegations contained in the reply of Mrs. Augusta H. Baker, administratrix, and those of the answer filed to the second amended petition of the plaintiff in error, and of the rejoinder of Baker, Eccles & Company, and of the answer of Mrs. Augusta H. Baker, individually, adopting as her own, her answer filed as administratrix, should be considered controverted of record. There were a number of motions to strike, also demurrers, which are not noted, because immaterial to the consideration of the question presented.

For the convenience of the court, we append to the petition, the assignment of errors and the opinion of the Court of Appeals of Kentucky.

III.

FACTS.

Charles Baker died on September 1, 1912 a citizen of and domiciled in Kentucky; all of his personal estate was in Kentucky, except a small amount of money found in his pocket upon his death.

He, with his brother, E. W. Baker, owned a tract of land in Hardin County, Tennessee. He formerly lived in Tennessee, but twelve years prior to his death, moved to Paducah and engaged in the wholesale grocery business, and remained continuously an inhabitant of, and domiciled in the City of Paducah until his death.

IV.

POINTS AND AUTHORITIES.

(a) A judgment of a county court appointing an administrator is of no probative force upon the question of domicile in a contest in a court of a foreign state in the course of proceedings for the administration of assets within said foreign state.

Overby vs. Gordon, 177 *U. S.*, 214
Thorman vs. Frame, 176, *U. S.*, 350
Vaughn vs. Northup, 15 *Peters*, 1.
Story's Conflict of Laws, Page 850, *sec.* 514.
18 *Cyc.*, 1221.

Freeman on Judgments, Vol. 1, *page* 186, *sec.* 120.

Fletcher's Admr. vs. Sanders & Weir, 7 *Dana, p.* 223,

Jacob's Admr. vs. L. & N. R. R. Co., 10 *Bush*, 263.

Miller vs. Swan and Brown, 91 *Ky.*, 36.

Masters' Executors vs. Bienker &c., 87 *Ky.*, 1.

(b) "A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment, and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defense want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with

process, and did not enter his appearance."

Old Wayne Mutual Life Assn. vs. McDonough, 204, *U. S.*, 8.

Grannis vs. Ordean, 234 *U. S.*, 385.

Pennoyer vs. Neff, 95 *U. S.*, 714.

Nat'l. Exchange Bank of Tiffin vs. Wiley, 195, *U. S.*, 257.

Thompson vs. Whitman, 18 *Wallace*, 457.

D'Arcy vs. Ketchem, 11 *Howard*, 165.

Wharton's Conflict of Laws, secs. 32 *and* 654.

Story's Conflict of Laws, secs. 539-540.

Williams vs. Preston, 3 *J. J. Marshall*, 600.

Rogers vs. Coleman, 3 *Ky.*, (*Hardin*) 413.

Cobb vs. Haynes, 8 *B. Monroe*, 137.

Harris vs. John, 6 *J. J. Marshall*, 257.

V.

ARGUMENT.

The decisive questions in this case have reference to the clause in the Constitution of the United States requiring that full faith and credit be given in each State to the public acts, records and judicial proceedings of other States.

The errors assigned are eight in number, and the complaint is of the judgment of the Court of Appeals of Kentucky, because such judgment held the County and Chancery Court of Hardin County, Tennessee had not jurisdiction to conclude defendants in error by the judgments in said courts. The third and fourth assignments of error accurately state the contention. They are:

THIRD:

"The record of the Judicial proceedings by plaintiff in error in the administration and distribution of the estate of Charles Baker, deceased, in the County Court of Hardin County, in the State of Tennessee, having been authenticated in accordance with the laws of the United States and produced and suit based thereon in the State of Kentucky, the said judgment of the Court of Appeals of the said State of Kentucky failed and refused to give to said judicial proceedings such faith and credit as they have by law and usage in the courts of the said State of Tennessee."

FOURTH:

"The record of the judicial proceedings by plaintiff in error against defendant in error, Augusta H. Baker in the Chancery Court of Hardin County, Tennessee, wherein the domicile of Charles Baker, deceased, at the date of his

death, was regularly and validly adjudged to have been in the State of Tennessee and the plaintiff in error to be his sole distributee, having been duly authenticated in accordance with the laws of the United States and produced and suit based thereon in the State of Kentucky, the said judgment of the Court of Appeals of the State of Kentucky failed and refused to give to said judicial proceedings and judgment of the Chancery Court of Hardin County, Tennessee, such faith and credit as they have by the law and usage in the courts of said State of Tennessee."

It would seem a sufficient answer to the first assignment of error to cite the decision of this court in the case of *Overby vs. Gordon,* 177 *U. S.,* 214. You there considered the conclusiveness of a judgment appointing an administrator by the De Kalb County Court of the State of Georgia, when offered as proof of domicile in a contest between the heirs of the decedent before the Supreme Court of the District of Columbia, and you wrote:

"Now it is undeniable that the sovereignty of the State of Georgia and the jurisdiction of its courts at the time of the adjudication by the De Kalb County Court, by the grant of letters of administration on the estate of Haralson, did not extend to or embrace the assets of the decedent situated within the territorial jurisdiction of the District of Columbia, and, viewed as a step in a proceeding in rem relating to property within the jurisdiction of the court, the adjudication of a grant of letters would have no binding probative force in contests respecting property lying outside of the territorial dominion of the State of Georgia."

The defendants in error do not deny the right

of the County Court of Hardin County, Tennessee, to grant letters of administration upon the estate of Charles Baker, deceased, for it appears he died intestate, holding real and personal property in that County; but it is contended that the appointment of such administrator, though rightful, was effective only for the purpose of assembling assets belonging to the estate, and after the payment of debts, to hold the same for distribution among his rightful heirs; that such court had no power to adjudge the domicile of the decedent or the devolution of his personal property; that it was ex parte and effective for no purpose other than stated. The question of domicile might become important if the decedent was a resident of the State of Tennessee; its importance being only to establish the particular county court which was vested with jurisdiction to appoint such administrator.

> "We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile, by a mere finding of such a fact in a proceeding in rem. In other words, proceedings which were substantially ex parte cannot be allowed to have greater efficacy than would a solemn contest inter partes, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.
>
> Our conclusion being that the adjudication of the fact of domicile in Georgia made in the grant of letters by the De Kalb County Court, and which was not made in a contest inter

> partes, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District."
>
> [*Idem*]

This would seem decisive of the question here, for the appointment was made without notice, upon application of the plaintiff in error. The defendants in error resided in the State of Kentucky, and had no notice, actual or constructive of either the application or the appointment.

It was argued below that a county court of Tennessee

> "is a Court of superior and general jurisidiction in matters of administration, so that its orders and decrees are given the same force and effect and the same presumptions are indulged in their favor, in that field of its jurisdiction, as in the case of other courts of superior and general jurisidiction."

And we understand the third assignment of error to mean that the refusal of the Courts of Kentucky to hold the appointment of the plaintiff in error as administratrix of Charles Baker, deceased, by the County Court in Tennessee immune from collateral attacks in this State to be a denial of the constitutional guarantee of the first section of the fourth article of the Contsitution.

In *Thorman vs. Frame*, 176 *U. S.*, 350, the question for decision is stated as follows:

> "The question before us is whether the Supreme Court deprived Mrs. Thorman of a right secured to her by the Constitution and laws of the United States in holding that her appointment as administratrix of the succession of Joseph Fabacher was not a conclusive adjudication that Fabacher's domicile was at the time of his death in the parish of Orleans, Louisiana."

Answering the question, you say:

"Whatever the effect of the appointment, it must be as a judgment and operate by way of estoppel. A judgment in rem binds only the property within the control of the courts which rendered it; and a judgment in personam binds only the parties to that judgment and those in privity with them. This appointment cannot be treated as a judgment in personam, and as a judgment in rem it merely determined the right to administer the property within the jurisidiction, whether considered as directly operating on the particular things seized, or the general status of assets there situated. . . . In *DeMora vs. Concha*, 29 *Ch., Div.* 268, it was held that the decree of a probate court was not conclusive in rem as to domicile, although the fact was found therein, because it did not appear that the decree was necessarily based on that finding; and it was doubted whether the findings on which judgments in rem are based are in all cases conclusive against the world. The decision was affirmed in the House of Lords, 11 App., Case 541. The case is a leading and instructive one, was ably argued and has been repeatedly followed since the judgment was pronounced."

"Again, it is thoroughly settled that the constitutional provision that full faith and credit shall be given in each State to the judicial proceedings of other States, does not preclude inquiry into the jurisdiction of the court in which the judgment is rendered, over the subject matter, or the parties affected by it, or into the facts necessary to give such jurisdiction."

It was not an essential of the exercise of jurisdiction by the County Court of Hardin Count, Tennessee to adjudge the domicile of Charles Baker; the essentials of such Jurisidiction are, first, death,

and second, property of the decedent within the jurisdiction of the Court. Admittedly the jurisidictional essentials existed, but the Court, in the exercise thereof, was not required to, nor did it have the power to pass on the question of domicile.

Judge Story in the very early case of *Vaughn vs. Northup,* 15 *Peters, Page* 1, says:

> "Every grant of administration is strictly confined in its authority and operations to the limits of the territory of the government granting it; and does not de juri extend to other matters. It cannot confer as a matter of right, any authority to collect assets of the decedent in any other State; and whatever operation allowed to it, beyond the original territory of the grant is a mere matter of comity which every nation is at liberty to yield or to withhold, according to its own policy and pleasure with reference to its own institutions and the interests of its own subjects."

In *Story's Conflict of Law, page* 850, *section* 514, it is stated:

> "For it is exceedingly clear that the probate grant of letters testamentary, or of letters of administration, in one country, give authority to collect the assets of the testator or intestate only in that country, and do not extend to the collection of assets in foreign countries; for that would be to assume an extraterritorial jurisidiction or authority and to usurp the functions of the foreign local tribunals in those matters."

In 18 *Cyc., page* 1221, it is stated to be

> "A well settled principle of the common law that letters of administration have no extraterritorial force and confer no authority upon the representative to administer upon property outside of the State or country of his appointment."

Such being the law, the County Court of Tennessee clearly could not make an order or deliver a judgment that would bind the property situated in the State of Kentucky; its determination that Charles Baker died domiciled in that State did not, and could not, conclude his heirs living in Kentucky, nor could it affect any property of such heir in this State. The administatrix appointed by the Tennessee County Court could not sue or be sued in Kentucky Courts, nor could she assume dominion or control over her intestate's estate here, and if she had invoked the aid of the County Court of Tennessee for a sale of the property of her intestate here, the act would have been void.

> "So if a probate court should make an order for the sale of property situate in another state than the one in which the order is made, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the court, and would be void. This rule has been held to be applicable even where personal property, though in another state at the death of its owner, was subsequently brought within the state where the order was made." *Freeman on Judgments, Vol.* 1, *page* 186, *sec.* 120.

The decisions of the Court of Appeals of Kentucky are in accord with the doctrine stated above.

In VII *Dana, page* 223, *Fletcher's Admr. vs. Sanders and Weir,* it is said to be

> "A well settled doctrine that letters of administration granted by one nation or state, can have no operation per se, within the jurisdiction of another nation or state; that, therefore, such authority, being local, can de jure, vest no right of suit in any other country than that in which it was granted."

And as a corollary of this rule, Kentucky Courts hold that though county courts, in matters of probate, are courts of general and exclusive juris-

diction, nevertheless the appointment of an administrator may be collaterally called in question where the proper averments are made. The leading case in this State on the subject is *Jacobs' Admr. vs. L. & N. R. R. Co.*, 10 *Bush, page* 263, wherein it is said:

> "The proceedings of the County Court in matters of probate and administration are not conclusive as to the jurisdiction of the Court, and such jurisdiction may be collaterally called in question where the proper averments are made; but in such cases the onus is upon the party raising the issue to show that want of jurisdiction."

In the later case of *Miller vs. Swan and Brown*, 91 *Ky., page* 36, it is said:

> "The domicile of the testatrix being a jurisdictional fact as to the probate, the jurisdiction of the County Court of Hardin to admit the paper to probate may be questioned in this collateral proceeding."

In *Masters' Executors vs. Bienker &c.*, 87 *Ky., page* 1, the Court writes:

> "The proceedings of a County Court in this State in matters of probate and administration are not conclusive as to the jurisdiction. It may be called in question by proper averments."

The Court of Appeals of Kentucky held so much of the judgment of the County Court in Tennessee as undertook to determine the residence of Charles Baker was in Hardin County at the time of his death, and that as a legal consequence thereof, his widow, under the laws of the State, was his sole distributee and entitled to the whole of his personal estate, void as to defendant in error, Mrs. Augusta H. Baker, his mother. It was this that called forth the third assignment of error, and we submit the judgment of the Kentucky Court was in accord with the decisions of this Court and with the common

law. The Kentucky judgment does not undertake to disturb any right secured to the plaintiff in error, under the laws of the State of Tennessee.

II.

Admittedly, the Chancery Court of Hardin County, Tennessee was a court of original and superior jurisdiction, and if it had jurisdiction of the parties and the subject matter, its judgment is entitled to the same faith and credit in the courts of other states they receive in the courts of Tennessee. The fourth assignment of error is that the Court of Appeals of Kentucky failed and refused to give to the judgment of the Chancery Court and the judicial proceedings therein, the faith and credit to which it was entitled. As a corollary of this proposition, the fifth assignment of error complains that the Kentucky Courts heard evidence to determine the place of domicile of Charles Baker, deceased, the Tennessee judgments having established that fact. The sixth assignment of error, likewise predicated upon the fourth assignment, complains that the Kentucky Courts held the judgment of the Chancery Court of Tennessee wihtout jurisdiction to determine the devolution of personal property beyond its borders against persons constructively summoned, where such constructive summons was in conformity to the laws of Tennessee.

The final determination of a court is a judgment in personam or in rem, or both, so the investigation of the alleged errors requires the consideration, first of the scope and binding effect of judgments in personam and in rem; and second, the jurisdiction and power of the Court to pronounce such judgment. The defendants in error were not before the Chancery Court of Tennessee by summons or personal process, nor did either of

them appear by attorney. It may be noted that the defendant in error, Baker, Eccles & Company, were not parties, even in name to the action in the Tennessee Court by the plaintiff in error, nor was the defendant in error, Augusta H. Baker, administratrix of Charles Baker, deceased, as such, though she was made a party as an individual and before such Court by publication or constructive service. In these circumstances, was the judgment of the Chancery Court in Tennessee a judgment in personam against the defendant in error, Mrs. Augusta H. Baker? It will be admitted that it was not against her as administratrix, nor was it a judgment of any character against defendants, Baker, Eccles & Company. In *Old Wayne Mutual Life Association vs. McDonough,* 204 *U. S., page* 8, it is declared to be the "settled doctrine" of this Court, that,

> "The Constitutional requirement that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State is necessarily to be interpreted in connection with other provisions of the Constitution and therefore no State can obtain in the tribunals of other jurisdictions full faith and credit for its judicial proceedings if they are wanting in the due process of law enjoined by the fundamental law. 'No judgment of the Court is due process of law if rendered without jurisdiction in the court, or without notice to the party.' "
>
> "A judgment rendered by a State Court in an action in personam against a non-resident, served by publication of summons, but upon whom no personal service of process within the state was made and who did not appear to the action, was devoid of any validity either within or without the territory of the State in which the judgment was rendered."

Such is the language of this Court in *Grannis vs. Ordean*, 234 *U. S.*, 385. Authority for the statement is based upon the case of *Pennoyer vs. Neff*, 95 *U. S.*, 714. This Court wrote in the case of *National Exchange Bank of Tiffin vs. Wiley*, 195 *U. S.*, 257 that,

> "It is thoroughly settled that a personal judgment against one not before the court by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law."

In the same case you consider the right of a court to look into the jurisdiction of a foreign court in a suit based upon a judgment rendered by such foreign court:

> "If his appearance was entered and judgment confessed by one who had, in fact, at the time, no authority to do either; and consequently, that the court was without jurisdiction to proceed except on legal notice to him or without his appearance in person or by an attorney authorized to represent him. If law and usage in Ohio were to the contrary, then, such law and usage would be in conflict with the Constitution of the United States."

The decision was grounded upon the leading case of *Thompson vs. Whitman*, 18 *Wallace, page* 457. Speaking for the court, Mr. Justice Bradley in that case wrote:

> "On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

And quoting from *D'Arcy vs. Ketchum*, 11 *Howard*,

165 with approval, he says:

> "Thus a judgment by the court of a State against a citizen of such State, in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign State."

The language of *Whartons Conflict of laws, Sections* 32 *and* 654 *and Story's Conflict of Laws, Sections* 539-540 that

> "A foreign judgment is impeachable for want of personal service within the jurisdiction of the defendant, this being internationally essential to jurisdiction in all cases in which the defendant is not a subject of the State entering judgment, and it is competent for a defendant in an action on a judgment of a sister State, as in an action on a foreign judgment, to set up as a defense want of jurisdiction, in that he was not an inhabitant of the State rendering the judgment and had not been served with process, and did not enter his appearance."

was approved in *Gover and Baker Sewing Machine Company vs. Radcliffe,* 137 *U. S.,* 287. Judge Story, in his *Conflict of Laws,* declared that to hold otherwise would be contrary to natural justice.

In *Pennoyer vs. Neff,* it is held that "substituted service by publication" is

> "where the entire object of the action is to determine the personal rights and obligations of the defendants, that is where suit is merely in personam; . . . . . is ineffectual for any purpose."

The law as stated prevails in this State: *Williams vs. Preston,* 3 *J. J. Marshall,* 600: *Rogers vs. Coleman,* 3 *Ky., (Hardin)* 413; *Cobb vs. Haynes,* 8 *B. Monroe,* 137 *and Harris vs. John,*

6 *J. J. Marshall,* 257.

So it appears that the action of the Kentucky Court in inquiring into the jurisdiction of the Tennessee Court violated no right of the plaintiff in error; that the Tennessee judgment, attempting to fix the status of the property in Kentucky claimed by the defendants in error, who were not personally served with process was "coram no judice." If the judgment was not effectual in personam, it remains only to be seen if it was a judgment in rem.

> "Jurisdiction is acquired in one of two modes: First, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case, the defendant is not personally bound by the judgment beyond the property in question. And it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding in rem."
>
> *"Pennoyer vs. Neff.,* 95 *U. S.,* 714.

Broadly speaking, a proceeding in rem is "an action instituted against the thing," but the "thing" in controversy here was in Kentucky; the Tennessee action could not be called a proceeding in rem. We understand opposing counsel to admit that the Tennessee judgment was not binding in personam or in rem, but by a process of illusive reasoning, it is argued that the Tennessee action was neither the one thing nor the other, but concerned the estate of Charles Baker; that, as plaintiff in error was the domiciliary administratrix, she was entitled to the personalty of her decedent wherever situated, and that therefore, the Tennessee Court had jurisdiction of the property held by her as such domiciliary administratrix. The vice of the contention is that it assumes as a postulate, the litigated fact, for,

> "where different administrations are granted in different jurisdictions, that which is granted in the jurisdiction of the decedent's last domicile is termed the principal or domiciliary administration."
>
> 18 *Cyc., page* 1222.

Fletcher's Admr. vs. Sanders and Weir, VII Dana, 344, states that:

> "Moveable property has no situs because it is deemed personal and therefore subject to the laws of the owner's domicile in every respect (except for the purpose of administration), and therefore, should be distributed according to the law of his domicile."

so that to determine the devolution of the personal property of Charles Baker, it was necessary to judicially determine his domicile. This, the Tennessee Courts was without power to do, because it had no jurisidiction of the person of the defendants in error.

Therefore, defendants in error respectfully submit that the writ of error is taken for delay only, and that the contentions upon which it is claimed the Federal question depends are apparently so frivolous as not to require further argument.

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VI.

APPENDIX.

(A) ASSIGNMENT OF ERRORS.

(B) OPINION OF COURT OF APPEALS OF KENTUCKY.

And now comes the said plaintiff in error and in connection with her petition for a writ of error herein, respectfully submits that in the record, proceedings, decision, and final judgment of the Court of Appeals of the State of Kentucky, in the above entitled matter, there is manifest error in this, to-wit:

First. The said judgment of the Court of Appeals of the State of Kentucky is repugnant to and in conflict with Article IV. section 1, of the Constitution of the United States, which declares that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Second. That said judgment of the Court of Appeals of the State of Kentucky is repugnant to and in conflict with the Act of Congress, section 905 U. S. Revised Statutes, which proscribes the manner in which the public Acts, records, and judicial proceedings of any State or Territory of the United States shall be authenticated, and declares that "the said records and judicial proceedings, so authenticated, shall have full faith and credit given them in every court within the United States as they have by law or usage in the courts of the State from which they are taken."

Third. The record of the judicial proceedings by plaintiff in error in the administration and dis-

tribution of the estate of Charles Baker, deceased, in the County Court of Hardin County, in the State of Tennessee, having been authenticated in accordance with the laws of the United States and produced and suit based thereon in the State of Kentucky, the said judgment of the Court of Appeals of the said State of Kentucky failed and refused to give to said judicial proceedings such faith and credit as they have by law and usage in the courts of the said State of Tennessee.

Fourth. The record of the judicial proceedings by plaintiff in error against defendant in error Augusta H. Baker in the Chancery Court of Hardin County, Tennessee, wherein the domicile of Charles Baker, deceased, at the time of his death, was regularly and validly adjudged to have been in the State of Tennessee and the plaintiff in error to be his sole distributee, having been duly authenticated in accordance with the laws of the United States and produced and suit based thereon in the State of Kentucky, the said judgment of the Court of Appeals of said State of Kentucky failed and refused to give to said judicial proceedings and judgment of the Chancery Court of Hardin County, Tennessee, such faith and credit as they have by the law and usage in the courts of said State of Tennessee.

Fifth. The said judgment of the Court of Appeals of the said State of Kentucky erroneously failed and refused to give to said judgments of the County Court, and of the Chancery Court of Hardin County, in the State of Tennessee, determining the place of domicile of Charles Baker, deceased, any faith and credit or any force and effect whatsoever, in the State of Kentucky; and erroneously heard and considered evidence on the question of such place of domicile, and on such evidence erroneously overturned and nullified the findings and judgments of said county and Chancery Courts of Tennessee on that issue of fact.

Sixth. The said judgment of the Court of Appeals of the State of Kentucky erroneously held and adjudged that the Chancery Court of Hardin County, Tennessee, conceded to be a Court of superior and general jurisdiction, in a confessedly regular and valid proceeding brought in accordance with the laws of that State by the lawful personal representative of the intestate decedent, Charles Baker, appointed there and charged with the duty of distribution of his personal estate a substantial part of which was located there, and against all persons interested and who were brought before such court either by personal or by constructive service as required by the laws of that state in such cases, could not decide and finally determine the issue of fact as to the place of the domicile of the intestate so as to bind and conclude a non-resident defendant brought before such court by constructive service and who did not personally appear and defend; and erroneously held and adjudged that such finding and judgment of the Chancery Court of the State or Tennessee might be collaterally attacked and disregarded by such non-resident, in the State of Kentucky.

Seventh. The said Court of Appeals of the State of Kentucky, having erred in the respects above indicated, erroneously affirmed the judgment of the McCracken Circuit Court in the State of Kentucky dismissing the suit of petitioner therein, because there are no other matters or grounds contained in the record which can warrant or sustain such dismissal and affirmance.

Eighth. The said Court of Appeals of the State of Kentucky, having held and treated the proceeding and judgment of the said Chancery Court of Hardin County, Tennessee, as regular and valid within the State of Tennessee, and as having conclusively established in that State that the domicile of Charles Baker was in the State of Tennessee so as to entitle plaintiff in error to all his personal

estate within the State of Tennessee, the said Court of Appeals of the State of Kentucky erred in failing and refusing to hold and adjudge that said judgment was effective to entitle plaintiff in error to the certificates for $27,000 of stock in the corporation of Baker, Eccles & Company, which certificates were then and there present and in the custody and jurisdiction of said Tennessee Chancery Court.

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BERRY & GRASSHAM,
E. W. ROSS,
JNO. A. PITTS,
Attorneys for Plaintiff in Error.

Baker, et al. vs. Baker, Eccles & Company, et al.

(Decided February 11, 1915.)

Appeal From McCracken Circuit Court.

Opinion of the Court by Judge Carroll.

—Affirming.

This litigation, concerning the descent and distribution of the personal estate of Charles Baker, and which involves one important and disputed question of fact and several interesting questions of law, arose in this way; Charles Baker was born and lived for a number of years at or near the town of Savannah, in Hardin County, Tennessee. In 1901 he came to Paducah, Kentucky, and engaged in the mercantile business, in which business he remained at Paducah from that time until his death in 1912.

In September, 1912, while en route to his old home in Tennessee for a visit, he died while on board a steamboat in Humphrey County, Tennessee, leaving surviving as his only heirs-at-law, his widow, the appellant, Mrs. Josie C. Baker, his mother, the appellee, Mrs. Augusta H. Baker, and a brother, E. W. Baker. At the time of his death he owned real property situated in Hardin County, Tennessee, also some personal estate located in that County, as well as valuable personal estate having a situs in Paducah, Kentucky, consisting of shares of stock in the Paducah Corporation of Baker, Eccles & Company, and a large debt against this corporation.

In November, 1912, his widow applied to the County Court of Hardin County, Tennessee, for letters of administration on the estate of her husband. The proceedings in this court, which were en-

tirely *ex parte,* were had on the motion of the widow. The request was granted and the order of the Hardin County Court appointing her administratrix recites that "at the time of his death the residence of the said Charles Baker was in Hardin County, Tennessee, and that he left therein estate, goods and chattels, rights and credits, the granting of the administration whereof belongs to this court; and Mrs. Josie C. Baker, the widow of the said Charles Baker, deceased, having applied for letters of administration on his estate, and she having a right thereto under the laws of the State of Tennessee, and the court being satisfied of her right to so administer, if is therefor ordered and decreed by the court that said application made by the said Mrs. Josie C. Baker for the granting of letters of administration on said estate to her be granted."

At another term of this County Court, held in December, 1912, it appears that Mrs. Baker presented a settlement of her accounts as administratrix, and thereupon this order was made: "It further appearing to the Court, from proof introduced to and heard by the Court, that the said Charles Baker died intestate, and at the time of his death was a resident of Hardin County, Tennessee, that he left no children or descendants of such surviving, but left surviving his widow, the said Mrs. Josie C. Baker, and, under the laws of the State of Tennessee, the said Mrs. Josie C. Baker, as the widow of the deceased, is etnitled to all of the surplus personal property of the estate, and the court being of the opinion that she is entitled to receive and hold as her own individual property all of the surplus personalty of the estate, after payment of the debts of the same and the expenses of the administration, so adjudges and decrees."

It further appears from the settlements and orders of this court that the debts due by the deceased were few in number and trifling in amount,

and that the widow as administratrix had in her possession certificates of stock owned by the deceased in the corporation of Baker, Eccles & Company, of Paducah, of the value of $27,000, and also some other personal assets of small value. On this showing it was ordered and adjudged by the court that Mrs. Baker as administratrix transfer and deliver to herself as the widow of the deceased all of the personal estate in her possession, including these shares of stock, and this was done as appears from the settlements and receipts filed in this court.

It will be observed that the order appointing Mrs. Baker administratrix recites that the Court heard proof on the subject of the place of the intestate's residence at the time of his death, but the record does not disclose what character of proof was heard, nor does it appear from the record that his mother or any other persons interested in his estate or its distribution were in any manner parties to this County Court proceeding or had any notice of it.

Subsequent to these proceedings in the County Court, and on December 28, 1912, Mrs. Josie C. Baker individually and as administratrix of Charles Baker filed in the Chancery Court of Hardin County, Tennessee, her petition in equity, or bill of complaint, as it is called in the Tennessee practice against Mrs. Augusta H. Baker, the mother, and E. W. Baker, the brother of the deceased, who were then residents of Paducah, Kentucky, and also against several persons who were residents of Hardin County, Tennessee. In her petition she set out her appointment as administratrix of the estate of Charles Baker in the Hardin County Court and averred that her husband died intestate, a resident of and domiciled in Hardin County, Tennessee, leaving surviving as his sole heir and distributee his widow, and as his only other heirs-at-law his brother, E. W. Baker, and his mother, Mrs. Augusta H.

Baker.

The petition further set up her ownership of the stock in the Paducah corporation of Baker, Eccles & Company, the interest of the deceased in several tracts of land in Tennessee, and averred that Mrs. Augusta Baker was asserting some claim and interest in the Tennessee lands owned by Charles Baker, and also to one-half of the personal estate left by him, upon the theory that he died a resident of the State of Kentucky, and under the laws of that State, his mother was entitled to one-half of his surplus personal estate.

The prayer of her petition was that Mrs. Augusta Baker and E. W. Baker be brought before the court in the manner provided for non-residents and be required to assert whatever claim they might have to the estate left by the deceased. She further prayed that it be adjudged that Charles Baker died a resident of the State of Tennessee, and that she, as his widow, was the sole distributee and entitled to all of his personal estate after the payment of his debts, and for all other and proper relief.

On the filing of this petition an order of publication was made citing Mrs. Augusta Baker and E. W. Baker, as non-residents, to make defense to the petition on a named day, and it is not questioned that these defendants were regularly proceeded against under the law of Tennessee, as non-resident defendants, although they did not appear in the action.

On April 7, 1913, an order was entered by the Court reciting that these non-resident defendants were regularly before the Court by publication and having failed to make any defense the petition, under the Tennessee practice, was taken for confessed as to them. It also appears that in April the depositions of several witnesses were taken for the plaintiff for the purpose of establishing among other things that Charles Baker was a resident of Tennes-

see at the time of his death.

On May 2, 1913, a judgment was entered in this chancery case adjudging that "the said Charles Baker at the time of his death was a citizen of and had his domicile at Savannah, Tennessee; that at no time was he a citizen of and domiciled at Paducah, Kentucky; that all of his life he was a citizen of and had his domicile at Savannah. Tennessee, and the court so adjudges and decrees."

It was further adjudged that his widow was the sole distributee, and as such entitled, in accordance with the laws of Tennessee, to the whole of the surplus personal property of which he died the owner. She was further adjudged entitled to the 270 shares of stock in the Baker, Eccles & Company corporation and the accumulated profits thereon.

This is all that need be said at this time respecting the proceedings in the Tennessee Courts and the orders and judgments therein made.

Turning now to the Kentucky Proceedings, it appears that on November 27, 1912, Mrs. Augusta Baker, mother of Charles Baker, was granted letters of administration on his estate by the County Court of McCracken County, Kentucky, and, on December 3, 1912, as such administrattrix she filed a petition in the McCracken Circuit Court for a settlement of the estate of Charles Baker, and to this petition his widow and Baker, Eccles & Company were made defendants. In this petition it was averred that Charles Baker died a resident of McCracken county, Kentucky, the owner of shares of stock in the Baker, Eccles & Company corporation of the value of $27,000, together with accumulated profits thereon, and some other articles of personal property, and also a claim of several thousand dollars against Baker, Eccles & Company. She also set up that herself and the widow were the only heirs-at-law of the decedent entitled to an interest in his estate, and that she was entitled to one-half

of his personal estate after the payment of debts and the widow to the other one-half.

In this action Mrs. Josephine Baker was proceeded against as a non-resident defendant, but whether she was brought before the court by virtue of these proceedings is a question that will later be disposed of. For the present it is sufficient to say that Mrs. Josephine Baker did not appear in this action, and on February 13, 1912, a judgment was rendered by the McCracken Circuit Court adjudging that Charles Baker died a resident of McCracken County, Kentucky, and that his mother, Mrs. Augusta Baker, under the Kentucky law, was entitled to one-half of the surplus personal estate of the deceased, and Mrs. Josephine Baker, as his widow, to one-half thereof.

In the judgment Baker, Eccles & Company was directed to cancel the 270 shares of stock in the corporation issued to Charles Baker and to re-issue one-half of these shares to Mrs. Josephine Baker and to re-issue the other half to Mrs. Augusta Baker. The remaining personal property found to be owned by the deceased after the payment of debts was also directed to be divided equally between these two persons.

In June, 1913, Mrs. Josephine Baker individually and as administratrix of Charles Baker, filed a suit in the McCracken Circuit Court against Baker, Eccles & Co., in which, after setting up the orders and judgments made in the Tennessee Courts and her sole ownership of the personal estate of the deceased by virtue thereof, she prayed that Baker, Eccles & Company be required to transfer to her individually the 270 shares of stock to which she was adjudged entitled by the Tennessee Chancery judgment, and also for judgment against it for $11,429.17, in which amount she alleged it was indebted to her husband at the time of his death. With this petition she filed certified copies of all the proceed-

ings had in the Tennessee courts, together with a copy of the evidence heard in the Chancery Court of Tennessee.

To this petition Baker, Eccles & Company filed its answer putting in issue all the averments of the petition, and also relied on the judgment of the McCracken Circuit Court in the case of Mrs. Augusta Baker heretofore mentioned.

Mrs. Augusta Baker came into this suit by an intervening petition in which she averred that Charles Baker died a resident of the State of Kentucky, and that under the laws of this State, and by virtue of the judgment of the McCracken Circuit Court in the suit brought by her, she was entitled to the interest in the estate of Charles Baker decreed to her by the McCracken Circuit Court judgment, which she averred was binding and conclusive upon Mrs. Josephine Baker. She further put in issue the validity of the orders and judgments made in the Tennessee County Court, as well as in the Chancery Court of Tennessee, and averred that the judgments in each of these courts in so far as they determined that Charles Baker died a resident of the State of Tennessee, and that his widow was entitled to the whole of his personal estate after the payment of his debts were void, because neither of these Tennessee courts had jurisdiction to make orders or judgments so declaring, and she relied on the judgment of the McCracken Circuit Court in the suit brought by her as finally determining not only the domicile of Charles Baker at the time of his death, but the devolution of his estate.

After motions to strike out parts of the petition of Mrs. Augusta H. Baker, as well as demurrers thereto had been overruled, a reply was filed controverting the affirmative averments of the pleadings of Mrs. Augusta Baker, and it was further averred that the judgment rendered in the McCracken Circuit Court in so far as it attempted to determ-

ine the rights of Mrs. Josephine Baker was void, because she was not before the court by either actual or constructive service of process.

When the pleadings had been made up, a large amount of evidence was taken on the issue as to the residence of Charles Baker at the time of his death, and thereafter, the case having been submitted for hearing, it was adjudged that the petition of Mrs. Josephine Baker be dismissed, and from that judgment this appeal has been prosecuted.

From this necessarily extended statement of the proceedings in the Tennessee and Kentucky Courts it will be seen that the real question at issue in this case is whether the widow of Charles Baker is entitled to the whole of his surplus personal estate under the Tennessee law, or his mother, Mrs. Augusto Baker, to one-half of it, under the Kentucky law, and that the solution of this question depends upon the residence of Charles Baker at the time of his death and the force and effect to be given to the Tennessee and Kentucky judgments.

In behalf of Mrs. Josephine Baker the argument is made that the Tennessee judgments finding that Charles Baker died a resident of Tennessee are conclusive of this question whether in fact he died a resident of that State or not, and this being so, his widow, under the law of Tennessee, about which there is no dispute, was and is entitled to the whole of his surplus personal estate. It is further contended in this behalf that the Kentucky judgment rendered by the McCracken Circuit Court in the case of Mrs. Augusta Baker, in so far as it undertook to determine Mrs. Josie Baker's interest in the estate of her husband, was void, because she was not before the court either by actual or constructive service.

For Mrs. Augusta H. Baker the argument is made that Charles Baker died a resident of the State of Kentucky, and therefore the Tennessee

Courts had no jurisdiction to determine that he died a resident of Tennessee or to distribute his estate under the laws of Tennessee, and, further, that the Kentucky judgment determining the rights of the widow and the mother is and was a valid judgment, and, as it has not been modified or vacated or any appeal prosecuted therefrom, it finally determined the rights of the parties.

Other questions upon which these respective arguments rest will be noticed in the course of the opinion.

Taking up first the validity and effect of the judgment of the McCracken Circuit Court, which, as stated, determined that Baker died a resident of Paducah, Kentucky, and that his mother, under the laws of this State, was entitled to one-half of his surplus personal estate and his widow the other one-half, the conclusion we have reached with respect to this judgment renders it unneccessary to discuss its effect or do more than set forth the reasons that have brought us to the conclusion that it is void in so far as it affects the rights of the widow.

In the suit in which this judgment was obtained the widow was proceeded against as a non-resident defendant. She was not actually served with process, nor did she in any manner enter her appearance to this action; so that unless the warning order proceedings were sufficient to bring her before the court on constructive service, she cannot be treated as being in any manner affected by this judgment; in other words, her status is the same as if she had not been made a party to this suit.

Without setting out in full Sections 57-61 of the Code covering the subject of constructive service, we think it sufficient for the purposes of the question we have to say that Section 57 of the Code provides that a warning order may be made upon an affidavit showing that the defendant is a non-resident of this State and believed to be absent therefrom, and also

stating in what country the defendant resides or may be found and the name, or place where a post-office is kept nearest to the place where the defendant resides or may be found.

Other sections of the Code provide that when this affidavit is made the clerk of the court shall make an order warning the defendant to defend the action on the first day of the next term of the court which does not commence within sixty days after the making of the order. In other sections it is provided that the clerk at the time of making the warning order shall appoint an attorney whose duty it shall be to inform the defendant of the pendency and nature of the action and report to the court the results of his efforts.

In this suit no separate warning order affidavit was made, nor was it necessary that one should have been made if the petition itself, which was properly verified, contained the matter which should have been embraced in an affidavit. The verified petition upon this point averred that "Mrs. Josephine Baker has left the State of Kentucky and is now a non-resident thereof, and she resides at Savannah, in the State of Tennessee, at which place a postoffice is kept and which is the nearest postoffice to the residence of said Mrs. Josephine Baker."

When the petition containing this affidavit was filed, a warning order, in due form, was made and a warning order attorney was appointed as provided in the Code, who, before the judgment was rendered, filed in proper form and manner a report showing that he had written Mrs. Baker at the address named, informing her of the pendency and nature of the action against her, but had not received any reply. So that the defect, if any, in these warning order steps consists in the insufficiency of the affidavit upon which the warning order was made. This affidavit is the basis of warning order proceedings, and no warning order can be made by the clerk or

attorney appointed under it until the affidavit provided by the Code had been made.

It will be observed that the affidavit conforms strictly to the Code requirements except that it fails to aver that Mrs. Josie Baker is believed to be absent from the State. It sets out that Mrs. Baker has left the State and is a non-resident thereof, and gives the place of her residence in the State of Tennessee and her postoffice in that State, but there are no words in the affidavit that supply the place of the averment that was believed to be absent from this State at the time the affidavit was made. And we think this averment was indispensable to the sufficiency of the affidavit and that in its absence the clerk had no authority to make the warning order or to appoint the attorney. In cases like this it is alone the fact that the defendant is absent or believed to be absent from the State at the time the affidavit is made that authorizes the proceedings against him as a non-resident. If the defendant is not absent or believed to be absent from the State, he cannot be proceeded against as a non-resident and accordingly the court would have no jurisidiction on constructive service to enter a judgment affecting his rights. This is so because it is the making of the warning order that commences the action, and the clerk has no authority to make this order except on a sufficient affidavit.

Admitting this to be true, it is said that we should presume that the defendant was absent or believed to be adsent from the State when the affidavit was made from the averment that the defendant was a non-resident of the State and resided in another State. But we do not think so. A defendant might be, legally speaking, a non-resident and yet be actually in the State and in the County where the suit was brought when the affidavit and warning order were made. *Redwine vs. Underwood*, 101, *Ky.*, 190; *Warrick vs. McCormick*, 150 *Ky.*, 800.

The argument is also made that, as this is a collateral attack on the validity of the judgment of the McCracken Circuit Court, every presumption must be indulged that the proceedings in that court were regular and every step necessary to give it jurisdiction to render the judgment was properly taken.

It is true that every presumption must be indulged to support a judgment against collateral attack, for in this respect there is a well defined and distinct difference between a direct and a collateral attack on a judgment. It is also well settled that on collateral attack a judgment cannot be successfullly assailed unless it is void for a want of jurisdiction in the court to render the judgment that appears upon the record. *Bamberger, vs. Green,* 146 *Ky.,* 258; *Maysville R. R. Co. vs. Ball,* 108 *Ky.,* 241; *Dennis vs. Alves,* 132 *Ky.,* 345.

We are also clear that the attack made on this Kentucky judgment was a collateral attack, as a direct attack on a judgment can only be made in the manner pointed out in the Code; that is to say, by prosecuting an appeal or by proceedings had under the Code and in the manner pointed out in Sections 340, 414 and 518 for the modification or vacation of judgments. An attack made on a judgment in any other way is a collateral attack. *Black on Judgments, Volume* 1, *Section* 252; *Vanfleet on Collateral Attack on Judicial Proceedings, Sec.* 2; *Duff vs. Hagins,* 146 *Ky.,* 792.

Being then a collateral attack, will we presume that all the proceedings taken by the court necessary to sustain the validity of the judgment were regular? The rule upon this subject is that if the record is ancient or it does not affirmatively show everything that was done, the presumption will be that the things it does not show have been done in such manner as that if they appeared in the record there would be no defect and so the judgment on collateral

attack will be treated as erroneous, but not void, and consequently not subject to collateral attack. But if the record is fresh and affirmatively shows everything in such a way as that no presumption can be indulged in that something was done that does not show in the record, then the record must control, for there is no room to presume that something else may have been done that would cure the defect, and in this state of case if the defect is substantial the judgment is void and may be attacked collaterally. Supporting this rule reference may be had to *Hynes vs. Oldham*, 3 *T. B. Mon.*, 266; *Benningfield vs. Reed*, 8 *B. Mon.*, 102; *Newcomb vs. Newcomb*, 13 *Bush*, 544; *Carr vs. Carr*, 92 *Ky.*, 522; *Wilson vs Teague*, 95 *Ky.*, 47; *Sears vs. Sears*, 95 *Ky.*, 173; *Segal vs. Reishert*, 128 *Ky.*, 117; *Steel vs. Stearns Coal & Lumber Co.*, 148 *Ky.*, 429; *Kreiger vs. Sonne*, 151 *Ky.*, 739.

The rule, however, favoring all presumptions that can be indulged in to sustain the validity of a judgment on collateral attack cannot be here invoked because the whole of a new record is here, and it affirmatively shows the absence of the conditions upon which the court had jurisdiction to render a judgment affecting the rights of a non-resident, and this being so, this judgment as to the widow must be treated as void. *Green's Heirs vs. Breckinridge's Heirs*, 4 *T. B. Mon.*, 541; *Brownfield vs. Dyer*, 7 *Bush*, 505; *Arthurs vs. Harlan*, 78 *Ky.*, 138; *Grigsby vs. Barr*, 14 *Bush*, 330; *Clark vs. Raison*, 126 *Ky.*, 486.

But the invalidity of this judgment does not, as we will presently attempt to show, have the effect claimed by counsel for the appellant, or strengthen the case for the widow.

Taking up next the validity and effect of the Tennessee county court judgment, we are clearly of the opinion that so much of this judgment as undertook to adjudicate that the residence of

Charles Baker was in Hardin county, Tennessee, at the time of his death, and as a legal consequence of this his widow, under the laws of Tennessee, was his sole distributee and entitled to the whole of the surplus of his personal estate, was void so far as the rights of his mother were attempted to be affected. In view of the admitted fact that Charles Baker, at the time of his death, owned both real and personal estate in Hardin county, Tennessee, there can be no doubt that under the laws of Tennessee the county court of Hardin county had power and jurisdiction to grant letters of administration on his estate to his widow. This jurisdiction and power attached by virtue of the fact that he owned real and personal property in that county and was not dependent on the condition that he died a resident of that county. If he was, in fact, at the time of his death, a resident of McCracken county, Kentucky, the Tennessee county court would, under the circumstances, have had the same power and jurisdiction to grant letters of administration on his estate as if he had admittedly died a resident of Hardin county, Tennessee.

But it is one thing to grant letters of administration and another very different thing to determine the place of the intestate's residence for the purpose of affecting the devolution of his estate. The granting of letters of administration alone would not in any manner affect the devolution of his estate or determine the distributees or the shares to which they were entitled. The administrator would merely hold the estate in trust for the benefit of the persons entitled to the estate, with the duty of turning the estate over to such persons when their right was established and in the time and manner provided by the Tennessee law. So that the mother of Charles Baker could not and does not complain of so much of the Tennessee county court judgment as granted letters of administration upon his estate.

But manifestly this Tennessee county court could not, in this ex parte proceeding or application, instituted by the widow, to which his mother was not a party, on any kind of service or publication, have jurisdiction or power to adjudicate that the deceased was a resident of the State of Tennessee and thereby conclusively determine that his widow was entitled to the whole of his surplus personal estate and exclude his mother from participation. We do not know of any authority that would permit an interested party to be deprived of his right to make defense, or that would conclude him by a judgment rendered in the manner of this Tennessee judgment. Here we have two contestants for the personal estate of Charles Baker, each of them having at least some ground upon which to assert her right to an interest in his estate, and yet an inferior court, in the absence of one of the parties, undertakes to and does adjudge a fact upon which the other party becomes, by virtue of a local statute, entitled to the whole of this estate. It seems to us that a mere statement of this proposition is sufficient to conclusively refute the effect claimed for this county court judgment. It is fundamental law, recognized, as we think, by every court, that no person can be deprived in a legal proceeding of property to which he has or asserts claim unless he has been given notice in the manner provided by law, which may, generally speaking, be said to be actual or constructive notice of the pendency of the suit and that his right to the property is about to be determined and he must defend if he desires to save it.

Out of numerous authorities supporting these general statements we think it sufficient to refer to the leading case of *Pennoyer vs. Neff*, 95 *U. S.*, 714, 24 *L. Ed.*, 565. Another case involving a question very much like this was before the court in the case of *Overby vs Gordon*, 177 *U. S.*, 214, 44 *L.*

Ed., 741. In the Overby case, which involved a contest over the distribution of the estate of one Haralson, it appears from a statement of the facts that a Mrs. Gordon instituted proceedings in an appropriate court of the District of Columbia for the purpose of probating the last will of Haralson and to obtain letters of administration. In this proceeding an issue was made as to the place of residence of the deceased at the time of his death, and there was introduced a record showing that administration on his estate had been granted by a probate court of the State of Georgia. The District of Columbia court ruled that he died a resident of the District of Columbia and denied the conclusive effect of the Georgia proceedings. In considering the case the Supreme Court said:

"The single question for consideration is, was the grant of letters of administration by the court of ordinary of De Kalb county, Georgia, competent evidence upon the issues tried in the Supreme Court of the District of Columbia respecting the domicile of the decedent at the time of his death?"

The order of the Georgia court granting letters of administration recited "that Haralson died a resident of De Kalb county, Georgia," and it was contended that this was a conclusive adjudication of the place of his residence, notwithstanding the fact that the proceedings were ex parte and that no notice to other interested parties was given sufficient to bring them before the court for the purpose of determining their rights. And the court said: "From the record of the proceedings instituted in the De Kalb County Court it is apparent that the ultimate purpose was to adjudicate upon and decree distribution of the estate of the deceased, the appointment of an administrator being a mere preliminary step in the management and control by the court of assets of the estate. The question of domicile would seem to have been important only

as establishing the particular court of ordinary which was vested with jurisdiction to administer the assets within the State of Georgia. The subject matter or res upon which the power of the court was to be exercised, was, therefore, the estate of the decedent."

Then, after an extended discussion of the question, the court said: "We are of the opinion that the De Kalb County Court possessed the power to determine the question of domicile of the decedent for the purpose of conclusively adjudicating the validity within the State of Georgia of a grant of letters of administration, but that it did not possess the power to conclusively bind all the world as to the fact of domicile by a mere finding of such fact in a proceeding in rem. In other words, proceedings which were substantially ex parte cannot be allowed to have greater efficacy than would a solemn contest inter partes, which would have estopped only actual parties to such contest as to facts which had been or might have been litigated in such contest.

"Our conclusion being that the adjudication of the fact of domicile in Georgia made in grant of letters by the De Kalb County Court, and which was not made in a contest inter partes, was of no probative force upon the question of domicile in a contest in a court of the District of Columbia in the course of proceedings for the administration of assets within said District, it results that the Supreme Court of the District did not err in excluding the transcript in question, whether tendered as evidence conducing to establish or as conclusively fixing the domicile of the deceased." To the same effect is *Thormann vs. Frame,* 176 *U. S.,* 350, 44 *L. Ed.,* 500.

If in a proceeding like the one had in this county court the rights of persons not in any manner parties to the proceeding could be conclusively de-

termined and property to which they asserted claim be taken from them in the manner here attempted, it would follow that in all cases judgments might go affecting the rights of persons who were not parties to the proceedings, and this practice would of course be at war with the established doctrine that no person can be deprived of his property without opportunity to be heard in his defense. *Black on Judgments, Vol.* 1, *Sec.* 226; *Hovey vs. Elliott,* 169 *U. S.,* 42 *Law Ed.,* 215.

Our conclusion, therefore, is, upon this branch of the case, that the adjudication or the Tennessee county court that Baker died a resident of Tennessee, and accordingly his widow was entitled to the whole of his surplus personal estate, was absolutely void and open to attack in any court in which a claim under it might be asserted. *Spencer vs. Parsons,* 89 *Ky.,* 577; *Francis vs. Lilly,* 124 *Ky.,* 230; *Carpenter vs. Moorelock,* 151 *Ky.,* 506; *Black on Judgments, Vol.* 2, *Section* 894.

Passing now to the chancery court judgement, we find that under the laws of Tennessee the chancery court occupies substantially the same position that circuit courts do in this State. In other words, Tennessee chancery courts are courts of general jurisdiction, and accordingly have the power to settle estates of deceased persons and determine the rights of conflicting claimants thereto, as well as all other matters that may be necessary in adjudicating the rights of the parties. So that the chancery court had jurisdiction to adjudge that Baker died a resident of Hardin county, Tennessee, and that his widow, under the laws of Tennessee, was entitled to the whole of his surplus personal estate. Admitting all this, and, further, that his mother was properly before the court on constructive service, the only remaining question is the effect to be given to this judgment of the chancery court when it is attempted to take under it personal

property having a situs in this State. We use the expression "having a citus in this State" because we think Baker died a resident of Kentucky, and accordingly the personal estate owned by him at his death and here in controversy had a situs in this State.

On this issue counsel for the widow urgently insists that this Tennessee chancery judgment, standing as it does unmodified and unreversed, conclusively settled not only in Tennessee but everywhere every question determined by it affecting parties who were before the court by actual or constructive service, and therefore its operation and effect could not be called in question when suit was brought on it in this State.

That it had in the State of Tennessee, where it was rendered, and as to property situated in that State, the conclusive effect claimed for it, may be readily admitted, but whether it shall have that effect as to property having a situs here is another question. It is a general rule of law that judgments of courts having jurisdiction of the person and subject matter of the action are conclusive until modified or vacated in the manner provided by the law of the State in which they are rendered upon the rights of all the parties who were before the court by such manner of process as would give the court jurisdiction of their person. But this rule is not without exceptions, and one of these exceptions arises, as we think, when a court undertakes to determine the descent and distribution of the estate of a person situated in another State so as to affect the rights of interested parties who have not been brought before the court by actual service of process and who have not entered their appearance. If Mrs. Augusta Baker, the mother, had entered her appearance in this Tennessee action or had been brought before the court by actual service of process, she would be conclusively bound

by the judgment in its effect upon property everywhere until she procured its modification or vacation in some manner allowed by the law of Tennessee. But, as she was only before the court by constructive service, we do not think the Tennessee judgment conclusively determined her right to the personal estate of Charles Baker that was situated in this State, although it did so determine it as to the property that had a situs in Tennessee, and this determination remains conclusive until it is overthrown by appropriate proceedings in the courts of Tennessee.

When suit was brought on that judgment in this State for the purpose of taking hold of the personal estate situated in this State, we think Mrs. Augusta Baker had the right to question the extra-territorial effect claimed for it. Or, in other words, to contend in opposition to the judgment that she was entitled to her share under the laws of this State of the personal estate of he son having a situs in this State at the time of his death; leaving, however, in full force and affect the judgment so far as it operated upon the estate of Baker situated in the State of Tennessee at the time of his death, and giving to it in that State the full faith and credit to which it was entitled under the laws of Tennessee.

An interesting and sound discussion of the effect of the judgment of a sister State rendered on constructive service when attempted to be made operative upon property located in another State, may be found in *Williams vs. Preston*, 3 *J. J. Mar.*, 600. In that case the court said: "It appears from the record that the appellant was 'no inhabitant' of Virginia, when the suit in chancery was instituted. . . . . Taking it therefore as conceded that he was not only a resident but a citizen of Kentucky, we are of the opinion that the decree against him can have no other effect than to operate on his

property which was within the jurisdictional limits of Virginia, and to attach which the suit in chancery was instituted.

"No court in Virginia could rightfully render a decree 'in personam' against a citizen of Kentucky, unless by being in Virginia and served with process, or by entering his appearance, he gave the court personal jurisdiction. Either the person or some of his property must be within the jurisdiction of a court before it can render any decree against the person or thing. The property does not give jurisdiction over the person. If a citizen of Kentucky own property in Virginia that property is subject to the laws of Virginia and her courts may have jurisdiction over it. But he, whilst he shall remain in Kentucky, is not subject to the laws of Virginia, nor can her courts exercise any jurisdiction over him, except so far as to reach his property in Virginia. . . . . .

"So the court of chancery of Virginia had jurisdiction over the chose in action of the appellant, which was attached; but its power extended no farther. It could sequester the property and subject it to the payment of the appellee's debt, but it had no power to render a decree against the appellant affecting him otherwise than by acting on his property in Virginia." To the same effect are *Harris vs. John,* 6 *J. J. Mar.,* 257; *Brand vs. Brand,* 116 *Ky.,* 785; *Downs vs. Downs,* 123 *Ky.,* 405; *Ely vs. Hartford Life Ins. Co.,* 128 *Ky.,* 799; *Freeman on Judgments, Sections* 564, 584; *Black on Judgments, Sections* 794, 795, 904 *and* 905.

In view of these authorities and many others that might be cited, we think it safe to state it is a rule of general application that a court of one State has no jurisdiction to enter a judgment on constructive service affecting real or personal property situated in another State, its jurisdiction being confined to affecting by its judgment property

situated in the State where the judgment was rendered.

This being so, it seems to us that there is no sound reason, so far as the rights of the parties to this suit are concerned, why this rule should not be applied in this case. The attempt is here made to affect property situated in this State by the Tennessee judgment to the same extent as if it was sought to effect it by a judgment in an attachment suit or a suit to enforce a mortgage or other lien obtained in the Tennessee court on constructive service.

But it is said by counsel that as the chancery court had unquestioned jurisdiction to determine that Baker was a resident of Tennessee, and as that was within the proper scope of the suit brought, the adjudication that he was a resident is conclusive upon this subject, and therefore it follows as an inevitable result of this that the widow is entitled to all of his surplus personal estate no matter where situated, if it were such character of personal estate as had a situs at the residence of the owner. It may be admitted that the question of Baker's residence was a proper subject for adjudication in that suit, but this adjudication should not be given extra-territorial effect when to do so would be to determine the status of property having a situs in this State.

It would be the merest evasion of the principle we have announced to say that a court on constructive process could not directly settle the descent and distribution of property in another State, but might conclusively but indirectly settle it by adjudging another point upon which the devolution of the foreign estate would depend, and this is precisely the effect here claimed for this Tennessee judgment. If this were a sound rule, then, for example, a judgment on constructive service might be rendered against a citizen of one State by a court of another

State to the effect that he had signed and delivered the note sued on and it was a just and existing debt against him without going any further, and if suit were brought in the State of his residence upon this judgment, the defendant would be denied the right to make any defense that would defeat the debt, and judgment would inevitably go against him for the amount of it. It would further follow as a result of the recognition of the doctrine asserted by counsel that if a person died intestate in one State owning property in several States, the judgment first rendered in a court of any of these States that determined that he was a resident of that State, with all the parties in interest before the court by constructive service, would affect in a conclusive and unimpeachable way the descent of his property in every State in which it was situated, although, in truth and in fact, the intestate may not have been a resident of the State.

In other words, under this rule, if a man died intestate, leaving estate situated in several States, and a suit setting up his residence therein was brought in each of these States by some of his heirs for the purpose of determining the descent and distribution of his estate, and the heirs residing in each of the other States were brought before the court by constructive service, then the judgment that was first rendered, if it recited that the deceased died a resident of that State, would be conclusive on the rights of all the heirs and settle the title to the estate situated in each of the States. The further effect of this doctrine would be that the rights of heirs in cases like this would be determined, not on the justness or merits of their respective claims, but on their diligence or ability to obtain the first judgment. It would be a race as to which could obtain the first judicial recognition of his asserted rights, with the prize depending on the speed with which the judicial machinery in each

of the several States could be put in motion and adjudicate the question presented.

It appears to us that this method of settling the property rights of conflicting claimants by judicial action ought not for a moment to be entertained. It would give to the swift an advantage they ought not to have and take from the slow rights of which they ought not to be deprived.

How, then, it may be asked, and indeed is, are the rights of heirs to be determined when there is property of the decedent situated in several States? Our answer is, that the courts of each State in which the estate has a situs at the time of the death of the deceased have jurisdiction, in a suit brought for that purpose, and in which all of the interested parties are brought before the court by constructive service of process, to determine between them their respective rights to the property situated within the State. And if one or more valid domestic judgments are thus rendered, the force of these judgments is to be confined within the jurisdiction of the court rendering the judgment, the order in which the judgments were rendered not being controlling, the last judgment being equally as effective as the first and the first of no more force than the last.

With this status existing between heirs having antagonistic interests, each relying upon the judgment most favorable to him, the question comes, how could the heirs who were not satisfied with the property received under the judgment they had obtained impeach or overthrow the judgment in the other State? Our answer to this is, that the parties to any of these judgments may take the judgment they depend on and go into any of the other States in which judgments were rendered, or in other States in which estate is situated, and bring a suit in a court of competent jurisdiction in that State for the purpose of having the rights of the parties

to the property in that State settled, and in that court the rights of all the parties in interest who are brought before the court by actual service of process, or who entered their appearance would be conclusively settled as to the property in that State by the judgment rendered in the suit so brought, subject, of course, to the right to have it modified or reversed according to the practice of the State. This case furnishes a good illustration of our meaning. Mrs. Josephine Baker brought in the McCracken Circuit Court a suit on the Tennessee judgment, and Mrs. Augusta Baker entered her appearance to that suit. So that the court had complete jurisdiction of both the person and subject matter and the right to render a judgment that would be conclusive as between the parties as to the property situated in this State, leaving the Tennessee judgment in full effect as to the property situated in that State.

The remaining question, and the one that, according to our view of the law, is decisive of the rights of the parties to the property in this State is, was the domicile or legal residence of Charles Baker in Tennessee or Kentucky at the time of his death? This question we are fully authorized to conclusively dispose of, because all the parties are actually before the court and each of them has had opportunity to make defense to the claim asserted by the other. If Charles Baker died a resident of Kentucky, then his personal estate, practically all of which has a situs at the place of his residence, passed under the law of descent and distribution in this State. On the other hand, if he died a resident of the State of Tennessee, then it must pass under the laws of that State. We think he died a resident of this State, and will proceed to state the reasons that have induced us to come to this conclusion.

That he was born in Tennessee and lived there

until 1901, when he moved to Paducah, Kentucky, where he lived until he died, is admitted. Tennessee being then his domicile of origin, using the word domicile interchangeably with legal residence, the disputed issue is, did he change his residence and take up a residence of choice in Paducah? If he did the presumption is that his domicile of choice continued until his death.

On the one hand, it is contended that he came to Paducah with the intention of making that his residence and continued a resident of that place until his death, or, that whatever his intention was, his acts and conduct after he came to Paducah constituted him in law a resident of that place.

On the other hand, it is contended that he came to Paducah merely for the purpose of engaging in business without any intention of making it his home, and never established by his acts or conduct a legal residence in Paducah.

The legal principles determining the place of residence when it is in dispute are fairly well established. The difficulty arises only when it is attempted to apply these principles to the facts of each particular case. Generally speaking, a person cannot have a legal residence in two States or countries, although he may have an actual residence in many places. His actual residence may be in one place and his legal residence may be in another. It does not always follow that the place of actual residence is the place of legal residence, as a person may have an actual residence at a place where he is only temporarily located and where he has no intention of remaining permanently or indefinitely, while his legal residence will be at that place where he intends to remain permanently or indefinitely. Often, too, the place of legal residence is fixed both by intention and acts, and where both of these conditions concur, there is little trouble in determining the residence; but in other cases it is difficult

to reconcile the intention with the acts, and when a condition like this arises, the law will, from facts and circumstances, fix the legal residence of the party.

Out of a great number of cases on this subject we think the following may be selected as stating in a general way the rules of law that control. In *Williamson vs. Osenton,* 232 *U. S.,* 619, 58 *L. Ed.,* 758, the Supreme Court, quoting with approval authorities said: "If a person has actually removed to another place, with an intention of remaining there for an indefinite time, and as a place of fixed domicile, it is to be deemed his place of domicile, notwithstanding he may entertain a floating intention to return at some future period."

In *Ringgold vs. Barley,* 5 *Md.,* 186, 59 *Am. Dec.,* 107, the court said: "Whence once removed to his new domicile, however, the party's purpose to remain need not be fixed and unalterable. If it becomes a place of fixed present domicile, it will be sufficient to fix a residence, and although there may be a floating intention to return to his former place of abode at some future period, still these circumstances will not defeat the newly acquired residence or the rights and obligations which attach to it."

In *Gilman vs. Gilman,* 52 *Me.,* 165, 83 *Am. Dec.,* 502, the court said: "But if a citizen of Maine, with his family, or having no family, should go to California to engage in business there, with the intention of returning at some future time, definite or indefinite, and should establish himself there, in trade or agriculture, it is difficult to see upon what principle his domicile could be said still to be here. His residence there, with the intention of remaining there a term of years, might so connect him with all the interests and institutions, social and public, of the community around him, as to render it not only proper but important for

him to assume the responsibilities of citizenship, with all its privileges and its burdens. Such residences are not strictly within the terms of any definition that has been given; and yet it can hardly be doubted that they would be held to establish the domicile."

In *Helm's Trustee vs. Com.*, 135 *Ky.*, 392, this court, quoting with approval *Cooley on Taxiation*, said: "No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but from the whole, taken together, it must de determined in each particular case. . . From this point of view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of evidence in favor of two or more places; and it may often occur that the evidence of fact tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of still more conclusive and decisive character, which fix it beyond question in another."

In *Boyd's Exor. vs. Com.*, 149 *Ky.*, 764, the court quoted with approval this language: "It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicile of choice. But there must be to constitute it actual residence in the place, with the intention that it is to be a principal and permanent residence. That intention may be inferred from the circumstances or conditions in which a person may be as to the domicile of his origin, or from the seat of his fortune, his family and pursuits of life. A removal which does not contemplate an absence from the former domicile for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown or inferred from circumstances that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession,

office or calling, it does not change the domicile." *City of Lebanon vs. Biggers,* 117 *Ky.,* 430; *Graves vs. City of Georgetown,* 154 *Ky.,* 207, *and City of Winchester vs. VanMeter,* 158 *Ky.,* 31, are also illustrative cases upon this subject.

When we come now to attempt to apply the principle of these cases we are confronted with a mass of evidence on the subject of Baker's intention that is apparently in conflict with his acts and conduct, but out of all of it we think sufficient facts and circumstances can be gleaned to establish with certainty Paducah as the place of his legal residence when he died.

That he was warmly attached to Savannah, Tennessee, the place of his birth, and his home for many years, is shown by many statements made by him to different persons and at different times and places; and there is also much evidence of his expressed intention to return at some time to Savannah and make that place his permanent home. For example, he would often say that his home was at Savannah. That neither he nor his wife would be happy until they got back there. That he was going to build a house at a certain place in Savannah, and that he was in Paducah only for the purpose of making money, and after he had accumulated a sufficiency he was going back to his old home in Tennessee.

When approached by candidates at Paducah and asked to vote for them, he would often say he could not do it because he voted in Tennessee. He would also say that he never owned a home in Paducah and did not own any real estate there, and did not want to buy any, as when he bought a home he was going back to Tennessee. Other witnesses say that he took an interest in Tennessee politics and at times observed that he did not want to give up his citizenship in that State. He told others that he had never voted in Paducah; that it

was a good place in which to make money, but not to live; and on one occasion when speaking to a lawyer about writing his will he told him that his home was in Tennessee and that he never claimed Paducah as his home. To other persons he said that he never paid any taxes in Kentucky, as he was a citizen of Tennessee and voted there and paid his poll tax there and expected to die there. There is also evidence that at the time of his death he was going to Savannah for the purpose of making some arrangements about building a house there. And it appears that he was assessed and paid a poll or head tax in Hardin county, Tennessee, in 1901 and 1902 and also in 1906.

That he had an affectionate regard for the State of his birth may well be conceded, but many of his expressions of attachment for the State and its people are attributed to the circumstance that the firm of Baker, Eccles & Company drew a large part of its business from the State of Tennessee, and its members were especially anxious to retain the friendship and good will of Tennessee people. With this business object in view it appears that they never neglected an opportunity to indulge in agreeable speeches about that State. As Illustrating this, E. W. Baker, a brother, who moved from Savannah to Paducah at the time the firm was organized, said: "As a matter of policy for the benefit of the business we referred continually to Savannah as home and our attachment for the place and done everything of the kind that we could think of that would foster a sentiment on the Tennessee River in favor of our business."

It is also manifest from the evidence that Charles Baker was a very genial man, with a disposition to be on friendly terms with every person with whom he came in contact. He liked to leave everyone in a good humor and made it a point to do and say things that would make a favorable impres-

sion on all with whom he had intercourse. As an example of this, it is shown that in telling candidates for office in Paducah that he could not vote for them, he gave as a reason that his home was in Tennessee in order to get rid of their importunities on the easiest terms and in such a way as not to give offense.

It is easily explainable why he paid his poll tax in Tennessee in 1901 and 1902, as it seems he did not leave there until some time in 1901, but why he should have paid a poll tax there in 1906 is not explained by the record. It is certain, however, that he did not pay any poll tax there in 1903 or 1904, or after 1906, and it is also shown in a very satisfactory way that after 1901 he did not cast a vote in the State of Tennessee.

If the place of Baker's residence had to be determined alone by intention manifested in speeches without any reference to the acts and conduct, that will presently be referred to, we would have little doubt in adjudging that he never lost his legal residence in Tennessee and only had an actual residence in Paducah for the purpose of conducting the business in which he was there engaged, all the while having it in mind to return to Tennessee when the objects of his sojourn in Paducah had been accomplished.

But when we turn to the other side of the case we find abundant reason for the opinion that, notwithstanding the "floating intention," as it is expressed in some of the cases, of Baker, he not only had an actual residence in Paducah, but acquired a legal residence there, which he retained until his death. He was not only actively engaged in business in Paducah for about eleven years continuously, but he actually resided there during the whole of this time and took an active part in the politics of the place. Several witnesses testify that he told them when candidates for office that he would vote

for them, and after election told them that he had voted for them. There is also evidence that he registered as a voter and paid a poll tax there. He was thoroughly identified with the social and business life of the place while he lived there, and, in short, so far as his acts and conduct was concerned, he was as much a citizen of Paducah as any other person who lived there; and about an hour before he died told the captain of the steamboat on which he was being carried on his expected visit to Savannah that "he was going to Savannah and would probably stay there until after the fair and was then coming back to Paducah and would vote for Wilson."

It is true he did not own a home in Paducah, but as he had no family except his wife, he probably thought, as do many other people so situated, that he could board with more comfort and less expense than he could keep house. He had no business interests in Tennessee except the land that had been given to him, and that was rented out. If, under these facts and circumstances, Baker could not be regarded as a citizen and resident of Paducah, it would be difficult to establish the place of legal residence on conflicting evidence.

For the reason stated, we think the judgment dismissing the petition of Mrs. Josie Baker should be affirmed, as the effect of the order of dismissal was to adjudge that Charles Baker died a resident of Kentucky, and, therefore, his mother was entitled to one-half of his surplus personal estate in this State and his widow to the other one-half. It is true the judgment appealed from did not so decree, but it is evident that the court merely dismissed the petition instead of entering such a judgment because it was of the opinion that the judgment rendered in the suit of Mrs. Augusta Baker, as administratrix, against Mrs. Josie Baker sufficiently determined the rights of the

parties, and it was unnecessary to again adjudge the matter. But, on a return of this case, the lower court will enter a judgment that Charles Baker died a resident of Kentucky, and that his mother, Mrs. Augusta Baker, is entitled to one-half and his widow, Mrs. Josie Baker, to one-half of his personal estate situated in this State at the time of his death, after the payment of his debts. The judgment should also direct Baker, Eccles & Company to cancel all certificates of stock issued by it to Charles Baker and to re-issue one-half of the shares to Mrs. Josie Baker and one-half to Mrs. Augusta Baker. Such other matters may be embraced in the judgment as will, after the payment of debts, distribute equally between the widow and the mother all other personal estate situated in this State of which Charles Baker died possessed.

Wherefore, the judgment is affirmed.

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NOTE.—The decision of this case will determine whether it is possible, under our system of laws, for any Court whatsoever to authoritatively and finally determine the *place of domicile,* and thereby fix the *lex domicilii* and *ascertain the distributees,* of a deceased intestate who leaves personal property situated in two or more states.

If the judgment complained of be affirmed, then that task will be *utterly and absolutely impossible,* in a very numerous and important class of cases, and the *lex domicilii* as controlling distribution will become, in such cases, a mere theoretical abstraction.

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 936.

JOSIE C. BAKER
Individually, and as Administratrix of
Charles Baker, Deceased,
Plaintiff in Error,

VS.

BAKER, ECCLES & COMPANY
AND
AUGUSTA H. BAKER,
Individually, and as Administratrix of
Charles Baker, Deceased,
Defendants in Error.

In Error to the Court of Appeals of
the State of Kentucky.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTIONS.

There is no basis for these motions.

The first—to dismiss because this Court has not jurisdiction—is not noticed at all in the supporting brief; and that the jurisdiction exists is

too clear for discussion. See Assignment of Errors, Printed Rec., 107-109; Opinion, *Id.*, 84-103.

The second—to affirm because the writ is taken and prosecuted for delay only, and the questions presented are so frivolous as to need little or no argument—is equally untenable. As to delay, the nature of the case excludes the possibility of any motive for it, or anything to be gained by it, on the part of Plaintiff in Error; and as to the questions presented, they are, as will appear from the Assignment of Errors and Opinion of the State Court, of the gravest character, not only as they affect the immediate parties but in their relation to the general body of the law. These questions we shall state and discuss in this brief.

The third motion—to transfer for hearing to the summary docket because the case does not require extended argument—is without merit; nevertheless, if sufficient time be allowed to fully brief the case, Plaintiff in Error will not resist this course, as she is desirous of a hearing as early as practicable.

QUESTION FOR DECISION.

Briefly stated, the question for decision is this:

Assuming the death of an intestate owning personal property in several states and leaving next of kin residing in several states, and a lawful administration in a state wherein the intestate died and some of the next of kin reside, and wherein all the real estate and a substantial part of the personal property of the intestate are situated—can a Court of Chancery in such state, having general jurisdiction, including the settlement and distribution of estates of deceased persons, in a suit brought by the lawful personal representative, finally adjudge and determine the *place of domicile* of the intestate at the time of death, so as to conclude next of kin residing in other states and made parties by publication in conformity with the laws of the state of the forum?

The Plaintiff in Error maintains the affirmative, and the Defendant in Error the negative. This suit was brought in Kentucky, and based on such a judgment in Tennessee. The Kentucky Court of Appeals, *recognizing all the facts we have assumed,* held the negative of this

question, and our complaint is that it thereby failed to give that due faith and credit to the judgment of the Chancery Court in Tennessee, which is required by the Constitution and Acts of Congress of the United States.

We have stated only the principal question presented by this writ of error. A similar point was made, and is preserved in the record, on the judgment of the County Court in Tennessee, which granted the letters of administration; but conceiving that, owing to the limited jurisdiction of that Court and the summary and *ex parte* nature of the proceeding therein, there is ground for doubting the conclusiveness of its finding as to domicile—especially as such finding was not *necessary* to its lawful grant of letters of administration—we do not emphasize, on this motion, that aspect of the case.

There was no question of the due and proper authentication of the record of the proceedings and judgment of the Tennessee Chancery Court, nor of the entire regularity thereof—in fact, both were and are now conceded. And the Assignments of Error on that judgment are the Fourth, Fifth, Sixth, Seventh and Eighth, on pages 108 and 109, printed record, which are as follows:

> "Fourth. The record of the judicial proceedings by Plaintiff in Error against De-

fendant in Error Augusta H. Baker, in the Chancery Court of Hardin County, Tennessee, wherein the domicile of Charles Baker, deceased, at the date of his death, was regularly and validly adjudged to have been in the State of Tennessee and the Plaintiff in Error to be his sole distributee, having been duly authenticated in accordance with the laws of the United States and produced and suit based thereon in the State of Kentucky, the said judgment of the Court of Appeals of said State of Kentucky failed and refused to give to said judicial proceedings and judgment of the Chancery Court of Hardin County, Tennessee, such faith and credit as they have by the law and usage in the Courts of said State of Tennessee.

Fifth. The said judgment of the Court of Appeals of the State of Kentucky erroneously failed and refused to give to said judgments of the County Court, and of the Chancery Court, of Hardin County, in the State of Tennessee, determining the place of domicile of Charles Baker, deceased, any faith and credit or any force and effect whatsoever, in the State of Kentucky; and erroneously heard and considered evidence on the question of such place of domicile, and on such evidence erroneously overturned and nullified the findings and judgments of said County and Chancery Courts of Tennessee on that issue of fact.

Sixth. The said judgment of the Court of Appeals of the State of Kentucky erroneously held and adjudged that the Chancery Court of Hardin County, Tennessee, conceded to be a Court of superior and general jurisdiction, in a confessedly regular and valid proceeding brought in accordance with the laws of that state by the lawful personal representative of the intestate decedent, Charles Baker, appointed there and charged with the duty of distribution of his personal estate, a substantial part of which was located there, and against all persons interested and who were brought before such Court either by personal or by constructive service as required by the laws of that state in such cases, could not decide and finally determine the issue of fact as to the place of the domicile of the intestate so as to bind and conclude a non-resident defendant brought before such Court by constructive service and who did not personally appear and defend; and erroneously held and adjudged that such finding and judgment of the Chancery Court of the State of Tennessee might be collaterally attacked and disregarded by such non-resident defendant, in the State of Kentucky.

Seventh. The said Court of Appeals of the State of Kentucky, having erred in the respects above indicated, erroneously affirmed the judgment of the McCracken Circuit Court in the State of Kentucky dis-

missing the suit of petitioner therein, because there are no other matters or grounds contained in the record which can warrant or sustain such dismissal and affirmance.

Eighth. The said Court of Appeals of the State of Kentucky, having held and treated the proceeding and judgment of said Chancery Court of Hardin County, Tennessee, as regular and valid within the State of Tennessee, and as having conclusively established in that state that the domicile of Charles Baker was in the State of Tennessee so as to entitle Plaintiff in Error to all his personal estate within the State of Tennessee, the said Court of Appeals of the State of Kentucky erred in failing and refusing to hold and adjudge that said judgment was effective to entitle Plaintiff in Error to the certificates of $27,000 of stock in the Corporation of Baker, Eccles & Company, which certificates were then and there present and in the custody and jurisdiction of said Tennessee Chancery Court."

Pr. Rec., pp. 108, 109.

THE FACTS.

Less than a dozen lines of the brief of adversaries are given to a statement of the facts (brief, page 10); and even these consist, in part, of an assumption of the fact in dispute, and, in

part, of matter contrary to the record. Naturally no pages of the record are cited. The statement is very misleading even as to matters now proper for consideration.

As to the *place of domicile* of Charles Baker, the intestate, at the time of his death—that was a matter of dispute. That question had to be decided by some Court, somewhere, before any administrator, anywhere, could make distribution of the personal effects in his hands; for until that question was determined the distributees could not be ascertained.

The material facts, now for consideration, are not those tending to establish *where the domicile was,* but are those only which relate to the competency of the forum undertaking to decide that question; and these are not in controversy.

These facts are:

1. Charles Baker, at his death, owned real estate to a considerable amount (all he owned at all), in Hardin County, Tennessee, where he was born and raised and where he married and was buried; and also personal property, consisting of moneys in bank and rents and debts due him, amounting to some $1,000 to $1,200. He also owned stock in a Kentucky corporation located at Paducah, amounting at face value to $27,000, and a debt against said corporation es-

timated at $7,000 to $11,000; but he owned no home or land in Kentucky.

2. He left no children or issue, but left a widow, residing at Savannah, in Hardin County, Tennesse, and his mother and only brother, residing at Paduach, in McCracken County, Kentucky.

3. He died suddenly, on September 1, 1912, in Humphreys County, Tennessee, while on his way from Paducah to Savannah.

4. At the November Term, 1912, of the County Court of Hardin County, Tennessee, the widow, Plaintiff in Error here, was duly appointed and qualified as administratrix of her husband, the said Charles Baker, and it is conceded by adversaries that this appointment was regular, lawful and valid.

5. In December, 1912, the widow, both personally and as administratrix, filed her bill in the Chancery Court of Hardin County, Tennessee, against sundry persons residing in that county, and her husband's mother and brother, residing in the State of Kentucky, for the following purposes:

(a) To inpound property and collect certain debts due her husband's estate, and to that end to have a receiver appointed;

(b) To have dower assigned to her out of the lands of her husband's estate;

(c) To have declared void certain alleged claims of her husband's mother to a life estate in certain of her husband's lands; and,

(d) To have the place of domicile of her intestate husband at the date of his death determined and adjudicated and her rights as distributee declared.

Pr. Rec., pp. 6-15.

All the relief sought, except that concerning the mother's claim upon the lands, was in due course obtained—the said Chancery Court, upon full hearing and elaborate proof, adjudging on final hearing, May 2, 1913, that the said Charles Baker at the time of his death—

> "was a citizen of and had his domicile at Savannah, Tennesse, that at no time was he a citizen of and domiciled at Paducah, Kentucky, that all of his life he was a citizen of, and had his domicile at Savannah, Tennessee."

And the said Court consequently further adjudged that, according to the laws of Tennessee, the complainant widow was the sole distributee of her husband and entitled to all his personal estate. (Pr. Rec., 26, 27.)

That this proceeding and judgment was entirely regular and in accordance with the laws of Tennessee, and valid and conclusive in that state, is conceded by adversaries and by the learned Court of Appeals of Kentucky.

Moreover, it is conceded by the learned Court of Appeals of Kentucky that this Tennessee judgment finally and conclusively settled *that the domicile of Charles Baker was in Tennessee,* at the date of his death, as to all persons both within and without the state; that these Defendants in Error cannot question or overturn *that finding;* but, notwithstanding the fact that the domicile of a deceased intestate when once established controls the succession of his whole personal estate wherever situated, that learned Court held that such finding and judgment only affected personal property *within the state of the forum,* and was not effective on personal property physically located in other states.

That learned Court states and decides the proposition as follows:

> "But it is said by counsel that as the Chancery Court had unquestioned jurisdiction to determine that Baker was a resident of Tennessee, and as that was within the proper scope of the suit brought, the adju-

dication that he was a resident is conclusive upon this subject, and therefore it follows as an inevitable result of this that the widow is entitled to all of his surplus personal estate, no matter where situated, if it were such character of personal estate as had a situs at the residence of the owner. It may be admitted that the question of Baker's residence was a proper subject for adjudication in that suit, but this adjudication should not be given extra-territorial effect when to do so would be to determine the status of property having a situs in this state." (Pr. Rec., 96.)

And again, the learned Court, perceiving the confusion to which such a conclusion inevitably leads, points out its answer—which we submit is confusion worse confounded—as follows:

"How, then, it may be asked, and indeed is, are the rights of heirs to be determined when there is property of the decedent situated in several states? Our answer is, that the Courts of each state in which the estate has a situs at the time of the death of the deceased have jurisdiction, in a suit brought for that purpose, and in which all of the interested parties are brought before the Court by constructive service of process, to determine between them their respective rights to the property situated within the state. And if one or more valid domestic judgments are thus rendered, the force of

these judgments is to be confined within the jurisdiction of the Court rendering the judgment, the order in which the judgments were rendered not being controlling, the last judgment being equally as effective as the first and the first of no more force than the last.

With this status existing between heirs having antagonistic interests, each relying upon the judgment most favorable to him, the question comes, how could the heirs who were not saisfied with the property received under the judgment they had obtained impeach or overthrow the judgment in the other states? Our answer to this is, that the parties to any of these judgments may take the judgment they depend on and go into any of the other states in which judgments were rendered, or in other states in which estate is situated, and bring a suit in a Court of competent jurisdiction in that state for the purpose of having the rights of the parties to the property in that state settled, and in that court the rights of all the parties in interest who are brought before the Court by actual service of process, or who entered their appearance would be conclusively settled as to the property in that state by the judgment rendered in the suit so brought, subject, of course, to the right to have it modified or reversed according to the practice of the state. This case furnishes a good illustration of our meaning. Mrs. Josie Baker brought in the McCracken

Circuit Court a suit on the Tennessee judgment, and Mrs. Augusta Baker entered her appearance to that suit. So that the Court had complete jurisdiction of both the persons and subject-matter and the right to render a judgment that would be conclusive as between the parties as to the property situated in this state, leaving the Tennessee judgment in full effect as to the property situated in that state." (Pr. Rec., 97, 98.)

We quote these paragraphs for the purpose of more clearly presenting the questions and issues, and not for the purpose of combatting them here—that we reserve for its proper place in the—

BRIEF AND ARGUMENT.

I.

Points and Authorities of Defendants in Error.

The authorities cited in the brief of adversaries fall far short of supporting the judgment in question. They do fairly establish certain propositions, not at all vital or even involved here, namely:

1. That a *personal* judgment against a non-resident upon publication or other constructive

service, without actual personal service or appearance, is void. *D'Arcy* v. *Ketchum,* 11 How., 165; *Pennoyer* v. *Neff,* 95 U. S., 714; *National Exchange Bank* v. *Wiley,* 195 U. S., 257; *Old Wayne, etc., Ins. Co.* v. *McDonough,* 204 U. S., 8; *Williams* v. *Preston,* 3 J. J. Marsh. (Ky.), 600, and other Kentucky cases cited in brief.

This proposition is recognized not only by this Court, but by the Courts of all the states, including Tennessee; but it obviously has no application here, for the Tennessee Chancery proceeding here in question involves no personal judgment against the non-residents—none was sought or obtained.

2. That, ordinarily, the probate of a will or the grant of letters of administration by a County or Probate Court in one state, does not involve the adjudication of the place of domicile of the testator or intestate, and therefore does not foreclose inquiry into the place of domicile in proceedings in other states. *Thorman* v. *Frame,* 176 U. S., 350; *Overby* v. *Gordon,* 177 U. S., 214.

In the first of these cases the bare appointment of an administrator in Louisiana by a Probate Court, without undertaking to adjudge the place of domicile at all, was held not to affect

that question in the State of Wisconsin; that as administration might be lawfully granted in Louisiana on *other* grounds than the local domicile of the deceased, the appointment did not even impliedly involve any finding as to the domicile; and hence that, irrespective of the jurisdiction of the Louisiana Probate Court over the question of domicile, its "bare appointment of an administrator" did not "foreclose inquiry as to the domicile of the deceased in the Courts of another state." And even this question, Mr. Chief Justice Fuller, delivering the opinion, declared was "a narrow one."

In the second of these cases, decided at the same term, it was held that the record of the appointment of an administrator by a Probate Court of Georgia of a deceased person as an intestate and reciting that he was domiciled in the State of Georgia, in a proceeding instituted *after* the propounding for probate of the will of the deceased and the making up of issues upon it and upon his domicile, in the District of Columbia, and to which latter proceeding the person procuring the appointment in Georgia was a party—was not admissible in evidence in the proceeding in the District of Columbia, as tending to show that the domicile was in Georgia and to estop the other party against maintaining the

contrary. This conclusion was based upon several considerations, and among them: (1) That the Georgia proceeding was not pleaded, nor set up as an estoppel otherwise than by being offered in evidence upon the trial; (2) that it was instituted and the appointment procured by a party to the contest in the District of Columbia, pending that contest, and with full knowledge of it; and (3) that by the laws of Gorgia administration might be granted in that state on numerous grounds *other* than that of the local domicile of the deceased, and therefore the determination of the place of domicile was wholly *unnecessary* to the making of the appointment —the Court following and quoting extensively from the case of *Concha* v. *Concha,* 11 App. Cases 541, to the effect that in a case *quasi in rem* the decision of a point *not necessary* to the action taken will not be conclusive in another proceeding. The opinion is a lucid and instructive one, and will be referred to again on other points in this brief. But these two cases, relating as they do only to the effect of County or Probate Court appointments of administrators under the special circumstances shown, do not bear in any material sense upon the validity of the Chancery Court proceeding in question here. That, obviously, must be determined by other considerations which will be treated later on.

3. The authorities cited by adversaries also establish the proposition, not at all questioned by us, that the jurisdiction of the Court rendering a judgment or decree in any state may always be inquired into when that judgment or decree is relied upon in another state, and that if the jurisdiction be found wanting the judgment will be void. *Thompson* v. *Whitman,* 18 Wall., 457; *National Exchange Bank* v. *Wiley,* 195 U. S., 257. But this does not get us anywhere, for there is no dispute here upon any *jurisdictional fact,* but only the legal question wether the *conceded facts* gave jurisdiction to the Chancery Court of Tennessee *to decide the issue of fact* as to the *place of domicile* of Charles Baker, and, assuming such jurisdiction, whether the decision affects the status of the whole personal estate of Charles Baker or only that portion within the state. This is the question to be decided, and will be discussed when we come to present our side of the case. We are now only considering the points decided by the authorities cited by our adversaries.

4. That, ordinarily, a proceeding *in rem,* or *quasi in rem,* affects only the property proceeded against and in custody of the Court, or within its jurisdiction. *Pennoyer* v. *Neff,* 95 U. S., 714, and other cases cited in adversaries'

brief. This is undeniably true as to all admiralty, prize and other forfeiture cases where the property itself is proceeded against; all attachments of local property for debt; partition and foreclosure proceedings; title suits relating to specific real estate; and, it is conceded, it is also true of grants of letters of administration and letters testamentary, so far as they operate to confer authority to sue as representative—the authority to sue is limited to the territory of the state granting it, unless permission be given by other states to exercise it within their borders, which is often done. Moreover, as we shall show, this inability of a domiciliary administrator to sue in a foreign jurisdiction upon a chose in action of the deceased, does not result from any want or defect of *title,* but from a legal *incapacity to sue there,* in the absence of an enabling local statute. Such administrator, as the representative of the distributees, succeeds to the *title* of the *whole personal estate,* wherever situated, subject, of course, to the claims of creditors, and, with respect to chattels located in other states, subject to the right of such states to have them administered there and local creditors paid there.

And so, in this connection we state briefly—to be verified by the authorities later on—that

this fourth proposition is not and cannot be universally true as applied to *personal property,* affected in many respects, and notably in its ownership and transmission by succession, by the law of the owner's domicile, and, especially for the purpose of succession upon the death or dissolution of the owner, universally treated as a *unit,* with its legal *situs,* wherever actually situated, at the owner's domicile, whether such owner be a natural person, corporation, or trust.

5. And finally, the authorities cited by adversaries establish that a personal representative of a deceased person *cannot be sued,* in his representative capacity, outside the state or jurisdiction of his appointment. *Vaughn* v. *Northup,* 15 Peters, 1. But it is not perceived how this proposition can have any possible bearing on the question for decision here.

These are the several propositions and the only ones for which adversaries have cited authorities. That they do not meet the question presented for decision upon this writ of error we submit is quite obvious. They may all be granted, and still the question here presented will remain unsolved.

II.

Tennessee Judgment as to Domicile Valid and Conclusive and Affects the Whole Personal Estate of Charles Baker.

As introductory to our argument of this proposition, we quote the very pertinent remarks of Judge Freeman in a note to *Shinn's Estate,* 45 Am. St. Rep., 665:

> "It is of frequent occurrence that persons die leaving large and valuable property interests in different states, and debts due them from persons in other states, and these occurrences are constantly increasing. State lines are becoming dimmer in this class of cases, and the questions arising therein are of great practical importance. Executors, administrators, and Courts of Probate must act respecting them, and the law should be clearly defined. Unfortunately this seems not to have been done, at least as to many of the questions growing out of this complicated subject. While an administrator or executor cannot sue in a foreign jurisdiction without clothing himself with the authority of ancillary administration, he must not disregard the interests of the estate, and must take timely and prudent measures to protect them, or run the risk of being charged for loss."

The learned annotator is speaking of a *domiciliary* representative, and with respect to personal assets in *other* jurisdictions; and there is food for serious thought in his observations. Modern social, business and industrial conditions in this country necessarily require a *dimming* of state lines as to many subjects, and especially as to the settlement and distribution of estates; and it is eminently true that the applicable rules, on many points growing out of such cases, are not clearly defined.

Fundamental principles, however, when rightly applied and kept in view, will suffice to guide the Courts to sound and safe conclusions, if they will not suffer themselves to be unduly influenced, as we think the learned Court below was, by exaggerated views of "states lines" and of the supposed *segregation,* into separate and independent parts, of the personal *estates* of deceased persons because of their location.

Among these fundamental principles are the following:

A.

The personal estate of an intestate decedent is a *legal unit,* having its *legal situs* at the owner's domicile; the *title* to the *whole of it,* wherever situate, is vested in

the duly qualified domiciliary administrator, and *not* in the distributees; and its succession or distribution is governed by the *lex domicilii* of the deceased owner.

In *Wilkins* v. *Ellett, Admr.,* 9 Wall., 740, holding valid the payment of a debt at Memphis, Tennessee, by a Tennessee debtor, to a foreign *domiciliary* administrator appointed in Alabama, as against the demand of an ancillary or local administrator subsequently appointed in Tennessee at the domicile of the debtor (there being no debts owing by the intestate in Tennessee), this Court said:

> "It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purpose of succession and distribution, wherever situated, as having *no other locality than that of his domicile;* and, if he dies intestate, the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. The original administrator, therefore, with letters taken out at the place of the domicile, *is invested with the title to all the personal property of the deceased* for the purpose of collecting the effects of the estate, paying the debts, and making dis-

tribution of the residue, according to the law of the place, or directions of the will, as the case may be.

It is true, if any portion of the estate is situated in another country, he cannot recover possession *by suit* without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no extra-territorial *authority.* The difficulty does not lie in any *defect of title to the possession,* but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interests of its *home creditors.* These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects; and generally are simply made subservient to the claims of the *domestic creditors,* the *residuum* being transmitted to the Probate Court of the country of the domicile, for the final settlement of the estate. It is upon this qualification of the law of comity and consequent inability of the original administrator *to sue in the foreign country,* upon which the objection is founded to the validity of the voluntary payment by the foreign debtor to him.

There is doubtless some plausibility in it growing out of the interests of the *home creditors.* But it has not been regarded of sufficient weight to carry with it the judicial

mind of the country. With the exception of the case in the State of Tennessee, none have been referred to, nor have our own researches found any, maintaining the invalidity of the payment. The question has been directly and indirectly before several of the Courts of the states, and the opinions have all been in one direction—in favor of the validity." (Italics ours.)

And when a case of the same style and between the same parties was before this Court some fourteen years later, reported in 108 U. S., 256, the Court said:

"There is no doubt that the succession to the personal estate of a deceased person is governed by the law of his domicile at the time of his death; that the proper place for the principal administration of his estate is that domicile; that administration may also be taken out in any place in which he leaves personal property; and that no suit for the recovery of a debt due him at the time of his death can be brought by an administrator *as such* in any state in which he has not taken out administration.

But the reason for this last rule is the protection of the rights of the citizens of the state in which the suit is brought; and the objection *does not rest upon any defect of the administrator's title in the property,* but upon his *personal incapacity to sue as administrator* beyond the jurisdiction which appointed him." (Italics ours.)

In this second case, it was sought to show that the domicile of the deceased creditor was in Tennessee and not in Alabama—there having been no formal adjudication of the place of the domicile; but the Court held that point immaterial, inasmuch as no question of distribution was involved, and it appeared that at the time of the payment there was neither any administration nor any creditor or distributee in Tennesee where the payment was made.

Both these cases are full authority for the proposition that a domiciliary administrator of an estate *takes title* to the *entire personal estate of the deceased,* wherever it may be situated; that it is to be regarded as a unit, located at the domicile of the deceased; and that its succession or distribution is governed by the *lex domicilii* of the deceased. They have been cited with approval and followed repeatedly by this Court and the State Courts, and the general authorities in this country, too numerous and familiar to require citation, are in accord with them.

And so is the law of England, 1 Williams on Exrs. (6th Am. Ed.), 650:

> "The general rule is, that all goods and chattels . . . go to the executor or administrator. By the laws of this realm, says

Swinburne, as the heir hath not to deal with the goods and chattels of the deceased, no more hath the executor to do with the lands, tenements and hereditaments. In other words, it may be stated, that, both at law and equity, the *whole personal estate* of the deceased *vests in the executor or administrator.*"

Id., Vol. 2, p. 1526:

"The rule is, that the distribution of the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death without any regard whatsoever to the place either of the birth or death, or the situation of the property at that time . . . for the *lex loci rei sitae* is not to be recognized."

And this rule is there applied in the administration and imposition of succession and other taxes or duties. To quote Sir Edward Williams again, Vol. 3, p. 1642:

"That personal property follows the person and is to be considered as *situate wherever the domicile of the proprietor is;* and consequently, that if the deceased, whether a British subject or a foreigner, died domiciled in England, all his personal estate, wherever situate, is to be regarded as English estate, and therefore liable (to the

duty). But if he died domiciled out of England, then the whole of his personal property, wherever it happened to be at the time of his death, is to be regarded as *situate in the country of domicile,* and therefore exempt."

Thompson v. *The Advocate General,* 12 Clark & Fin., 1, fully sustains this text.

From the fact that the title to all the personal estate *vests in the domiciliary administrator* when qualified, it necessarily follows that it *does not vest in the distributees.* They *take no title,* until distribution is ordered, or the right to distribution is accrued; and it is well settled that they can maintain no action or suit to recover their shares until after administration and the payment of debts and an order or decree for distribution is made or is due to be made—this being necessary to the transmission of title to them. *White* v. *Ray,* 4 Iredell Law, 14; *Davidson* v. *Potts,* 7 Ired. Eq., 279; *Carter* v. *Greenwood,* 5 Jones Eq. (N. C.), 410; *Sharp* v. *Farmer,* 4 Dev. & Bat. Law, 122; *Alexander* v. *Banfield,* 6 Tex., 400; *Miller* v. *Eastman,* 11 Ala., 609; *Cochran* v. *Thompson,* 18 Tex., 652; *Downer* v. *Downer,* 9 Penn. St., 302; *Kellar* v. *Butler,* 5 T. B. Monr. (Ky.), 574; *Wilkinson* v. *Perrin,* 7 T. B. Monr., 217; *Jenkins* v. *Freyer,* 4 Paige, 51; *Weeks* v. *Jewett,* 45 N. H., 540; *Tappan* v.

Tappan, 30 N. H., 50; *Woodin* v. *Bagley,* 13 Wend., 453; *Bucher* v. *Crouse,* 19 Wend., 306; *Lawrence* v. *Wright,* 23 Pick., 128; *Marshall* v. *King,* 24 Miss., 85; *Allen* v. *Simons,* 1 Curtis, 124.

The "estate" of a decedent, it is true, is neither a person nor a corporation, and has no capacity to sue or be sued, as such. It consists of property and property rights, title to which is vested in someone whom the law can recognize as its owner and representative. The relations existing between a domiciliary administrator and the intestate's personal estate and distributees are very closely analogous to those which exist between a corporation and its property and stockholders—in fact, save and except the stockholders' ultimate right of control through the election of directors, not possessed by distributees, these relations are practically identical. The corporation *owns* the property —is vested with the *title,* but holds it and is bound to manage it for the benefit and in the interest of the stockholders; the administrator *owns* the property—is vested with the *title,* but holds it and is bound to manage it for the benefit and in the interest of the distributees. The stockholder has *no title* to the corporate property, and can maintain no action for its possession or for injuries to it; neither has

the distributee any title to the personal property of the intestate—the estate—nor can he maintain any action for its possession or for injuries to it. The stockholder is entitled to his ratable share of the *residuum* of the corporate property after payment of debts and expenses, upon liquidation—his *title* then accrues, and not before; so, likewise, is the distributee entitled to his ratable share of the *residuum* of the intestate personal estate after payment of debts and expenses, upon liquidation by the administrator —his *title* then accrues, and not before. In both cases, the *personal* property, at all events for the purpose of distribution, is legally regarded as a *unit,* and as *located at the domicile* of the corporation or intestate, by the laws of which its distribution is governed; and in both cases, debts and legitimate expenses and taxes are preferred, and the shares of the beneficiaries are undeterminable until these are ascertained and paid.

And so, these relations may be fairly likened to those which exist between a trustee of personal property, invested with the title and possession, and the trust estate and ultimate beneficiaries. They will be found by analysis to be very similar, if not identical, at all points.

In all these cases, *state lines* are of little consequence. They have been so far *dimmed* by the

demands of modern civilization as to have become negligible, if indeed they were ever of potency on these questions. The system of rules and principles declared by these authorities is logical and consistent. It conserves harmony among the several states and encourages the utmost freedom among their citizens to trade and acquire and own property and conduct industries and enterprises wherever wish or interest may lead them, without regard to state lines and with assured confidence that however suddenly and unexpectedly death may overtake them, their property will go according to the laws of their homes.

Of course these rules and principles do not relate to or control *procedure*. They affect *right and title*. Nor do they impinge upon any just right of a state over property, of any kind, within its borders, for the protection of its own citizens and the support of its own government. It may tax it, wherever its owner resides. It may authorize proceedings against it for debt. It may authorize its appropriation, upon due compensation, for public use. It may forbid its removal until all claims of its citizens upon it or its owner are satisfied. It may grant administration upon it, and make its location the test of the place of administration within its borders, or of the place of its assessment for taxes.

But it cannot, we think, impair or destroy the *right and title* of the owner, domiciled in another state, nor that of his personal representative; nor can it destroy or segregate the *unity* of such personal property with the other similar property of the owner domiciled in another state, and make two or more "estates" of one, nor control its succession or distribution among the next of kin of the owner. At all events, the State of Kentucky has not undertaken by any statute to do any of these things.

These conclusions, we submit, necessarily follow from the authorities we have cited, and which are the underlying foundation for further contentions we make upon the immediate question involved.

B.

DOMICILIARY AND ANCILLARY ADMINISTRATIONS DISTINGUISHED.

We feel justified in emphasizing this distinction, although it has been substantially stated in the quotation from *Wilkins* v. *Ellett,* 9 Wall., 740. It is clearly and tersely stated by the authors of Cyc., Vol. 18, p. 1228, as follows:

> "The title of a domiciliary representative differs from that of an ancillary represent-

ative in that it extends to *all of the decendent's personal estate wherever situated,* while that of the ancillary representative is limited strictly to the assets within the jurisdiction of his appointment."

And they immediately add:

"This title, however, is not commensurate with that of the owner while living. It will not authorize the representative *to sue outside the jurisdiction of his appointment,* or to interefere in any way with an ancillary administration; but where there is no *local* administration, it is a title which other jurisdictions will recognize through comity, which debtors of the estate in other jurisdictions may recognize and will be protected in recognizing, and which will give validity to many acts of administration in other jurisdictions which can be performed *without recourse to the Courts."*

And on page 1229:

"Letters of administration extend only to the assets in the jurisdiction where the letters are granted, and do not confer as a matter of right any authority to collect assets in another. But since a foreign domiciliary representative *has a title* to the assets wherever situated which may be recognized in the absence of local creditors or a local administration, he may under such circum-

stances take possession of the property of the estate if he can do so peaceably and *without suit,* and his possession will be recognized as *rightful* and protected *as fully as if he had taken out local letters of administration.*"

And on page 1231:

"So, also, although a foreign representative cannot himself sue on a chose in action of his decedent, his disability is a personal *incapacity* and *not a defect of title,* and he may *assign a chose in action so that the assignee may sue thereon in his own name,* provided the statutes of the state where the action is brought permit the assignee of a chose in action to sue in his own name.

"A domiciliary representative may *assign shares of stock in a foreign corporation belonging to the estate, and no local grant of administration is necessary to compel a transfer on the books of the corporation.*"

And for these texts they cite cases from this Court, from Canada, and from the States of Alabama, California, Illinois, Minnesota, Mississippi, New Hampshire, New York, North Carolina, Rhode Island, South Carolina, Texas, and Utah.

To the same effect is the A. and E. Enc. Law (2d Ed.), Vol. 13, pp. 931-934, citing numerous

cases. In fact, there is no doubt, and, as we understand, no controversy in this case, upon the point.

And as has been seen from the opinion in *Wilkins* v. *Ellett,* the title of the ancillary or local administrator, in a state other than that of the intestate's domicile, is limited to the purposes of administration only, that is, collection or liquidation of the assets and the payment of debts, and does not extend to the purpose of *distribution of the residuum*—that is to be transmitted to the Court of the domicile, or the domiciliary administrator. *Wilkins* v. *Ellett,* 9 Wall., 740; *Hays* v. *Pratt,* 147 U. S., 557.

Of course, it is to be constantly borne in mind that our argument is limited to the *personal* property of the deceased. Real estate, it is conceded, is governed by the *lex loci rei sitae,* in *all* respects, both as to its acquisition, ownership and transmission by the owner in his lifetime and by will, and as to its succession by descent in case of intestacy. As well say the authors of Encyclopedia of U. S. Sup. Court Reports, Vol. 3, 1035, 1036, citing very numerous decisions of this Court, "It is an acknowledged principle of law, that the title and disposition of real property is exclusively subject to the laws of the country where it is situated. It is a principle

firmly established that the law of the state in which the land is situated must be looked to for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances." And they equally well state the rule that *mobila siquuntur personam* in same volume at page 1038. No question with regard to real estate is presented in this case, and these observations are made simply to emphasize the fact that we are discussing *personal* property only, and to avoid any possible misapprehension of our argument, especially by our adversaries who seem not always to be mindful of necessary and proper distinctions.

Now with these fundamental principles in mind, and before discussing the direct question whether the Chancery Court of Hardin County, Tennessee, had jurisdiction to decide and did finally and effectually decide the place of domicile of Charles Baker, it may be well to recur for a moment to the "Points and Authorities" and "Argument" of the Defendants in Error and movers of these motions, and thus demonstrate that they leave the real question involved still "up in the air"—to quote a provincialism.

They submit two "Points," with citation of authorities appended. (Brief, pp. 12, 13.)

The first is, in substance, that a *County Court* judgment *appointing an administrator* in one state has no probative force in a contest over the question of the *domicile of the deceased* in another state.

None of the authorities cited under this "Point" bear directly upon it except the two cases of *Overby* v. *Gordon* and *Thorman* v. *Frame,* from 176 and 177 U. S., already noticed; but the controlling question here is not the force and effect of an order of a *County Court appointing an administrator,* upon the question of the place of domicile of the deceased, and all that is claimed under this point and all that is decided by the authorities cited for it may be granted, and still we are no nearer a solution of the real question than before. The points decided by the two cases in this Court, in 176 and 177 U. S., as already suggested, are ,(1) that the *bare appointment* of an administrator in one state does not preclude inquiry into the domicile of the deceased in another state, and (2) that a recital of the place of domicile of the deceased in an appointment of an administrator by a Probate Court in one state, where domicile is not necessary to the validity of the appointment, is not evidence of domicile in a contest over the question of domicile in another state.

These propositions need not be questioned here, nor are they at all inconsistent with the validity of the *formal adjudication of domicile* by the Chancery Court of Tennessee in the condition and circumstances shown in this case. So this first "Point" of adversaries is not in the way.

The second "Point" is, in substance, that a judgment in one state is always impeachable for *want of jurisdiction* when set up and relied on in another state—which is no more than a familiar judicial axium everywhere recognized.

It is notably significant that *every case cited* under this "Point" (except two, which we shall specially discuss) is upon a judgment *in personam*—a specific *recovery of money, with award of execution,* without personal service of process or appearance. So far as we are advised, such judgments are everywhere treated as void. Our learned adversaries apparently ignore the distinction between such judgments and those of the character involved here—a distinction which we shall show is substantial and vital.

The two cases excepted from this category are *Thompson* v. *Whitman,* 18 Wall., 385, and *Grannis* v. *Ordean,* 234 U. S., 385.

In the first case, there was brought into question a judgment of the State of New Jersey for-

feiting a New York vessel for raking oysters in violation of a statute of New Jersey, which authorized seizure of the vessel *in the county where the offense was committed:* Held, that *seizure in the county* was essential to the jurisdiction, and that in a suit upon the judgment in New York, the want of jurisdiction might be shown by alleging and proving that the seizure was not made *in the county of the offense.*

In the second case, there was involved the question whether a judgment in partition was binding upon a non-resident lienor made a party by publication under the name of "Guilfuss," when the true name was "Geilfuss"—the contention being that this was a fatal variance and the judgment without due process of law and void; and the trial Court so held, but this Court held the contrary, and that the proceeding was valid.

It is clear, we think, that these cases, cited by adversaries under their second "Point," do not, any of them, touch the real question for decision in the instant case.

And when we come to the "Arguments" contained in the brief, we find they are subject to the same infirmity.

For the most part the argument (pp. 14-22) is devoted to the *County* Court judgment, ap-

pointing the administratrix, and consists entirely of quotations from the two cases cited from 176 and 177 U. S., and short extracts from *Vaughn* v. *Northup,* 15 Pet., Story's Conflict of Laws, Freeman on Judgments, 18th Cyc., and four Kentucky cases—all concerning the universally admitted proposition that a Probate Court can confer *no extra-territorial authority* upon an administrator appointed by it.

For examples: From *Vaughn* v. *Northup,* 15 Pet., 1—

> "Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government granting it," etc.

From Story's Conflict of Laws, Sec. 514—

> "For it is exceedingly clear that the probate grant of letters testamentary, or of letters of administration, in one country, give authority to collect the assets of the testator only in that country, and do not extend to the collection of assets in foreign countries," etc.

From 18 Cyc., 1221—

> "A well settled principle of the common law (is) that letters of administration have no extra-territorial force and confer no authority upon the representative to adminis-

ter upon property outside of the state or country of his appointment."

From 1 Freem. on Judgments, Sec. 120—

> "So if a Probate Court should make an order for the sale of property situate in another state than the one in which the order is made, this would also be an assumption of authority over a subject-matter not within the jurisdiction of the Court, and would be void," etc.

From *Fletcher* v. *Sanders,* 7 Dana (Ky.), 223—

> "A well settled doctrine (is) that letters of administration granted by one nation or state, can have no operation *per se,* within the jurisdiction of another nation or state," etc.

The other Kentucky cases—10 Bush, 263; 87 Ky., 1; and 91 Ky., 36—are simply to the point that, in Kentucky, the proceedings of the County Courts in matters of administration are not conclusive, though undeniably the rule is otherwise in Tennessee: *Brien* v. *Hart,* 6 Humph., 133; *Wilson* v. *Frazier,* 2 Humph., 30; *Railway* v. *Mahoney,* 89 Tenn., 311.

Obviously these propositions and authorities do not even tend to foreclose us on the real question in hand.

The "Argument" on the Chancery Court judgment is quite brief (pp. 22-27), and consists of further extracts from the same and some other similar cases, not one of which either involves in its facts or undertakes to consider the question for decision here. Let us demonstrate this observation by a brief reference to all the authorities cited in this branch of the "Argument."

From *Old Wayne Life Assn.* v. *McDonough,* 204 U. S., 8, involving a straight personal judgment for money and nothing else, the brief quotes, first, a general statement to the effect that the faith and credit clause of the Constitution does not extend to judgments rendered *without jurisdiction,* and then the following:

> "A judgment rendered by a State Court in an action *in personam* against a non-resident, served by publication of summons, but upon whom no personal service of process within the state was made and who did not appear to the action, was devoid of any validity either within or without the territory of the state in which the judgment was rendered."

From *Nat. Exch. Bank* v. *Wiley,* 195 U. S., 257, also involving a purely personal judgment for money, the "Argument" quotes:

> "It is thoroughly settled that a *personal judgment* against one not before the Court

by actual service of process, or who did not appear in person or by an authorized attorney, would be invalid as not being in conformity with due process of law," etc.

The judgment had been rendered on a note by confession of a person assuming to act as attorney of the makers under a power of attorney or warrant of authority contained in the note; and the Court, holding that this power was limited to a confession of judgment in favor of the original "holder" or payee of the note, and did not extend to a puchaser or assignee or endorsee of the note, permitted the fact to be shown that at the date of the judgment the plaintiff, the original holder, was *not,* but another *was,* the owner of the note, and held, consequently, that the judgment was *coram non judice* and void. The case is identical in principle with *Thompson* v. *Whitman,* 18 Wall., 457, and numerous other cases and authorities holding that the *jurisdiction* of the Court rendering judgment in one state may always be inquired into in another state—a proposition we do not question. The brief cites the 18 Wall. case, and 11 How., 165; Wharton's Conflict of Laws, Secs. 32 and 654; Story's Conflict of Laws, Sec. 539, 540; and 137 U. S., 287, all to the same point.

And from the same Kentucky cases already noted, viz.: 7 Dana; 3 J. J. Marsh.; 3 Ky.; 8 B.

Monr.; and 6 J. J. Marsh., extracts are made in the "Argument" on the Tennessee Chancery Court proceedings to the same purport already stated—and that is all of it.

At the conclusion, after a brief extract from *Fletcher* v. *Sanders,* 7 Dana (Ky.), 344, stating that "movable property *has no situs* because it is deemed personal and therefore subject to the law of the owner's domicile in every respect (except for the purpose of administration), and therefore, should be distributed according to the law of his domicile'—the "Argument" very truly and properly observes:

> ". . . so that, to determine the devolution of the personal property of Charles Baker, *it was necessary to judicially determine his domicile."*

But it finally adds this most patent *non sequitur:*

> "This, the Tennessee Court was without power to do, *because it had no jurisdiction of the person of the Defendants in Error."*

It is, we respectfully submit and shall endeavor to show, no less than absurd to say that no Court can validly and conclusively determine the *domicile* of a deceased person until it has before it by personal service or voluntary ap-

pearance *every person who by the laws of any other state or foreign country might have an interest as distributee*—and this is what the "Argument" of adversaries means.

The theory they pressed in the Court below on this point was, that the existence of the local domicile, *at the place of the forum,* was the *essential jurisdictional fact* which *alone* could confer upon the Court jurisdiction to decide *where the domicile was;* and hence, they argued, that the *place of domicile was always an open question* (as it was jurisdictional), and that the domicile being shown by *aliunde* proof *not* to have been *at the place of the forum* deciding its location in any case, the judgment of the Court adjudging its place was *without jurisdiction* and void *for all purposes.*

Of course, under such a theory, there could never be any final *adjudication* of the place of domicile at all, where the persons interested were in several different jurisdictions; for a second Court would be free to declare it at a different place from that declared by the first; a third, to declare it at a different place from those declared by the first and second, and so on *ad infinitum.* Such a conclusion could not be tolerated, and, of course, is not law.

II.

ARGUMENT IN SUPPORT OF TENNESSEE CHANCERY ADJUDICATION OF DOMICILE.

We come now to present, more directly, our side of the case.

We present an adjudication of the domicile of a deceased intestate who died in Tennessee, by a superior Court of general jurisdiction in that state, upon full hearing and proof, in a proceeding instituted by his widow—a distributee by the laws of both Tennessee and Kentucky—and the lawfully appointed administratrix, charged with the duty of *distributing* as well as administering the estate, in the state of the intestate's birth, marriage, death and burial, and wherein are located all his real estate and a substantial part of his personal estate, for the purpose, among others, of having the place of domicile of the intestate determined, and the right of succession declared; and to that proceeding the only other person having any possible interest in the question of domicile—the mother of the deceased—residing in the State of Kentucky, is made a defendant and brought before the Court by publication in conformity with the laws of the forum applicable to such cases, the averments of the bill are put in issue by the statute

of the state, proof is taken upon the notice prescribed by the statute, and the adjudication is made regularly and formally, in full accordance with the laws of the state. The record of this judgment, duly authenticated, is presented to a Court of Kentucky, which is asked to proceed in recognition of the adjudicated fact that the intestate died domiciled in Tennessee.

The Kentucky Court recognizes that the Chancery Court proceeding in Tennessee was regular and in accordance with its laws; that the Court had jurisdiction of the subject-matter and the parties; that the question of the place of domicile of the intestate at the date of his death was a proper and legitimate issue in that case, of which issue the Court had jurisdiction; and that its decision of that issue was *coram judice,* and binding and conclusive upon all persons, everywhere—*but,* because the mother would be a distributee if the intestate was domiciled in Kentucky, and she was not personally served with process and did not enter her appearance, and because all the intestate's personal property was not physically located in Tennessee, that Court held that the Tennessee judgment *affected only the property physically located in Tennessee,* and left the question of domicile open and untrammelled in other states where fragments of the personal estate might be.

To state the position of the Kentucky Court of Appeals somewhat more fully, and to show the results to which it leads, is a fair way, we think, to develop its unsoundness. It holds, as will appear from its full opinion, printed record, pp. 84-103:

1. That the Plaintiff in Error, the widow, was duly and validly appointed administratrix of Charles Baker, her husband, by the County Court of Hardin County, Tennessee;

2. That Charles Baker was born, raised, married and died in Tennessee, and that all of his real estate and a substantial part of his personal estate were located in Hardin County, Tennessee;

3. That the Plaintiff in Error, both as administratrix and distributee of her husband, filed the bill in the Chancery Court of Hardin County, Tennessee, for the legitimate and proper purposes of obtaining dower and administering the estate of her husband, and, as incidental thereto, of having the place of domicile of the deceased determined and the succession declared.

4. That said Chancery Court had full jurisdiction of such a proceeding and the issues presented by it, including the issue as to the place

of domicile of Charles Baker at the time of his death, and that all persons having any possible interest were made parties;

5. That all proceedings therein were regular and in conformity with the laws of the state and practice of the Court, including publication for the mother of Charles Baker and proceedings thereon;

6. That evidence was taken and submitted to the Court showing that Charles Baker was domiciled in Tennessee at the time of his death and had been all his life;

7. That said Court so adjudged and decreed, and thereupon declared the widow entitled as sole distributee to all the personal estate of her husband, wherever situated, including the certificates of stock held by him in the Kentucky corporation which were in her possession and exhibited to the Court;

8. That this was a lawful adjudication of the domicile of Charles Baker, and binding upon all persons, including the non-resident mother, *as to all personal property of Charles Baker in Tennessee;* but

9. That such adjudication *did not affect any part of the personal estate of Charles Baker lo-*

cated outside of Tennessee, and that the stock in the Kentucky corporation, notwithstanding the fact that the certificates were in the manual possession of the administratrix and directly awarded to her by the Court, was to be treated as *located* in Kentucky and unaffected by the judgment.

Now we think, and respectfully submit, that the limitation upon the scope and effect of the adjudication, imposed by the Kentucky Court, involves a confusion and misapplication of the fundamental principles to which we have called attention, and leads to results so startling as to render such a conclusion intolerable as a fixed rule of law.

In the first place, we think the Court has confused the rule applicable to a mere *grant of administration by a Probate Court,* with that which is applicable to a Court of general jurisdiction when dealing with the *distribution* of the estate of an intestate decedent, or other trust.

In the second place, it has wholly overlooked or ignored the rule so vigorously declared by this Court in *Wilkins* v. *Ellett,* 9 Wall., 740, that "the personal estate of the deceased is to be regarded, for the purpose of succession and distribution, wherever situated, as having no other location than that of his domicile," and has un-

dertaken really, contrary to this rule, to segregate and separate the personal "estate" of the deceased into as many distinct and independent "estates" as there may be found *fragments of it* physically situate in different states, with separate and different *rules of distribution* for each.

And in the third place, it has, we think, undertaken to substitute for the logical, consitent, and homogeneous system of law relating to the personal estates of intestates and their succession, one which is illogical, inconsistent, and literally bristles with possible absurd and intolerable consequences; in other words, it has overlooked the absolute necessity for an authoritative and final determination of the domicile of a deceased intestate even where, in many cases, all the persons having possible interests in the question, can never be brought by personal service before the same Court or tribunal. This necessity we shall presently demonstrate.

Now as to the first of these suggestions: It is very true that a Probate Court, by the appointment of an administrator, whether domiciliary or ancillary, can confer upon him authority as such representative only within the state of the appointment—it cannot effectively authorize him to *exercise his office* in another state.

This is declared by the same eminent authorities which emphasize the *title* of the domiciliary administrator to *all* the personal estate and its legal unity and location at the place of the domicile, wherever, for other purposes such as local administration or taxation, it may be situated; and this rule of title and constructive location is everywhere recognized as entirely consistent with the limitation of the *authority* of an administrator, as such, to the state of his appointment. His disability to sue or be sued in another state results, as we have seen, not from any *want of title,* but from *personal incapacity* to assert and exercise his office there. *Wilkins* v. *Ellett,* 9 Wall., 740; 108 U. S., 256. If the case were a contest over the *right to administer* the assets in the two states, then unquestionably the appointee in each state would have not merely the superior, but the exclusive, right in the state of his appointment and no right at all in the other state, and the *appointment* by the Probate Court in either state would have no effect whatever, as to the *right of administration,* upon personal property of the intestate in the other. But this is not such a contest, nor is the right of any creditor involved.

As to the second and third suggestions: The virtual segregation, by the Kentucky Court, of the "estate" of the intestate into as many dis-

trict parts as it may have fragments located in different states, with the application to these several parts of as many different bases and "rules of distribution" as the laws of such different states may respectively prescribe, with no possible means, in many cases, of preserving the unity of the whole estate and uniformity in its distribution among all the distributees—resulting from the manifest *impossibility,* in an increasingly numerous class of cases, of ever obtaining a *final* and *conclusive* adjudication of the *domicile of the intestate*—is not only in contravention of the fundamental principles of law on the subject, but, it seems to us, leads to interminable and insufferable confusion.

Let us make our meaning clear on this point.

Take the ruling of the Kentucky Court, which we have quoted, and apply it to a similar case of more extended and complicated scope in its facts. That Court says the Tennessee judgment as to the domicile of Charles Baker is binding on all persons, including non-residents of that state not personally served and not appearing, and *finally fixes such domicile in that state,* as to all his personal property *located within that state,* but that it leaves the question of his domicile open and at large in Kentucky *as to all property of the intestate located in Kentucky.*

This is the fundamental ruling upon which the whole decision is based; and, of course, this is conceived and in effect declared by the Court to be the rule applicable no matter in how many states the property may be located, or in how many states the possible distributees may reside, or how diverse may be the laws of distribution in such several states.

In the present case it happens that only *two* states are involved, and as the result of the decision we have *two* domiciles of Charles Baker, one in each state, conclusively established, with the consequence that *one part* of his "estate" is distributable according to the law of *one domicile* and *another part* according to the law of *another domicile.* And under the theory of the decision, there is no possible escape from this anomalous condition—the splitting of the "estate" into *two* separate and distinct *estates,* and the subjection of it to *two* divergent *laws of distribution.*

Now to make this incongruous anomaly even more glaring let us suppose the death, intestate, of a wealthy man about whose last domicile there is some doubt. He leaves no children or their descendants, but does leave a widow, a father, and numerous collateral kindred in various degrees of relationship, by both the whole- and the half-blood, residing, say, in a dozen different

states, in each of which some substantial part of his large personal estate is located, and in each of which the law of distribution is different from that of all the others.

In such a case, "to determine the devolution of the personal property" of the deceased, to quote from the brief of our adversaries, it is *"necessary to judicially determine his domicile."*

But how is it possible to "judicially determine" that domicile, under the theory of the Kentucky Court of Appeals? Assuming a lawful grant of administration in each state wherein part of the personal estate is located and some of the possible distributees reside, how is any one of these administrators who may claim to be the domiciliary representative—or whether he so claims or not—how is any one of them, or any of the claimants of shares in the whole estate, ever to have the *place of the intestate's domicile* settled authoritatively and the lawful distributees ascertained? It might be that the claimants residing in each state would be distributees by the laws of their state, but not distributees at all by the laws of any of the other states.

Undoubtedly, if the domicile of the intestate at the time of his death can be judicially ascer-

tained, its laws will control the distribution and point out the distributees who take *the whole property,* wherever it may be situate; and certainly the enlightened jurisprudence of the present day must afford *some means* for the solution of so important a problem.

But how can it be done under the theory of the Kentucky Court of Appeals in this case? We answer: It is utterly impossible.

That learned Court itself undertakes to answer this question; but does it? It says:

> "Our answer is, that the Courts of each state in which *the estate* has a situs at the time of the death of the deceased *have jurisdiction,* in a suit brought for that purpose, and in which all of the interested parties are brought before the Court by constructive service of process, *to determine between them* their respective rights *to the property situated within the state.* And if one or more valid domestic judgments are thus rendered, the force of these judgments is to be confined within the jurisdiction of the Court rendering the judgment, *the order in which the judgments were rendered not being controlling, the last judgment being equally as effective as the first and the first of no more force than the last."* (Pr. Rec., 97, 98. The Italics are ours.)

This is no answer at all, but, aside from being a confusion of ideas regarding "heirs" and distributees, and the "estate" and mere fragments thereof, is a confirmation of our point, that under the theory of that Court it is *impossible* in any case where the personal estate and claimants or distributees are scattered through several states having different laws of distribution, ever to *judicially determine the domicile,* so as to fix the rule of distribution for the whole estate.

In the case which we have supposed, how does the theory of the Kentucky Court of Appeals work? Let us suppose that—

1. In state A, where the death occurred and the widow resides, administration is granted and the administrator, having liquidated the assets and paid the debts, files his bill in a Court of competent jurisdiction to have the domicile of the deceased determined and the lawful distributees ascertained, making parties all next of kin of the deceased, including the widow who is either made defendant or joined as complainant, the non-residents being brought in by such publication or notice as the laws of the forum prescribe in such cases. The Court, upon full evidence, determines the domicile to be in state A, and there is no appeal or vacation of this judg-

ment. By the law of the *domicile thus ascertained,* the widow takes the *whole estate* to the exclusion of all collateral kindred.

(2) Subsequently, in state B, where a half-brother resides, a similar administration is granted and similar proceedings are had by the local administrator and half-brother, the widow and all other kindred being brought in by constructive service. That Court determines the domicile to be in state B, and there is no appeal or vacation of this judgment. By the law of the *domicile thus ascertained,* the half-brother takes the *whole estate* to the exclusion of the widow and all other kindred.

(3) Next, in state C, where a nephew of the whole-blood resides, a similar administration is granted and a similar course is taken, with the result that the domicile is there determined to be in state C, and there is no appeal or vacation of this judgment. By the law of the *domicile thus ascertained,* the nephew takes the *whole estate* to the exclusion of the widow, half-brother, and all other kindred.

(4) Next, in state D, where the father resides, a similar administration is granted and a similar course taken, with the result that the domicile is there determined to be in state D, and there is no appeal or vacation of this judgment.

By the law of the *domicile thus ascertained,* the father takes the *whole estate* to the exclusion of the widow, the half-brother, the nephew, and all other kindred.

And so on, to the end of the list of states and claimants resident in them, the *judicial determination* in each of the dozen states being that the *domicile* is in that particular state.

Now the Kentucky Court of Appeals in effect holds that all these judgments would be equally valid, and that each would conclusively establish the *domicile* of the intestate to be where it adjudges it to be, and control the distribution of the personal estate located *within that state.* And, moreover, it holds that each claimant under one judgment would be powerless to resist the claims of the other claimants under the other judgments.

The result, it is thus seen, is the establishment of a *dozen different domiciles* of a single decedent, in as many different states, and a splitting up of the "estate" into that number of different estates with as many different *leges domicilii* controlling distribution.

It is thus also seen that under this theory, in the case supposed and in very many which are much less complicated, it would be utterly *impos-*

sible to procure a *judicial determination of domicile* that would fix the basis of distribution of the *whole estate* and be binding on all the distributees. This would never be possible, under such a theory, unless *all* the personal property of the intestate was physically *within a single state,* or, possibly (and even this is inferentially negatived by the opinion of the Kentucky Court), unless *all the possible distributees* are before the Court by personal service or voluntary appearance—a thing utterly incapable of accomplishment by any known means in a very large class of cases.

What, then, are the real infirmities of this theory of the Kentucky Court of Appeals? And what is the alternative, to avoid, consistently with the fundamental rules and principles of law, the startling consequences to which that theory leads?

The infirmities, we respectfully submit, are these: (1) An inadequate conception of the nature and character of a proceeding in a Court of competent jurisdiction to determine the domicile of a decedent, and of the essentials of jurisdiction in such a case; (2) a failure to perceive the real *subject-matter* of such a proceeding; (3) a too narrow application to it of the law of proceedings *in rem;* (4) failure to recognize the

unity, the legal *oneness,* of an intestate decedent's personal estate, and the operation of the law of his domicile upon it and its distribution; and (5) failure to recognize the *necessity,* in this age, of some forum competent to *determine domicile* in such cases, and settle it, once and for all.

The alternative theory, which we think the correct one and consistent with all the fundamental rules and principles of law and justice, and which produces no startling results, and, moreover, which we think is demanded by the conditions of modern society, is in brief this:

That any superior Court having cognizance of suits by administrators and distributees *for the settlement and distribution of estates,* sitting in a state where an administrator has been *lawfully appointed,* where a *substantial part of the personal property of the deceased is physically located,* and where *some of the claimants* as distributees *reside,* where the administrator and resident distributees are before the Court by personal appearance or service, and all others possibly interested in the question of the domicile of the deceased are brought before the Court by reasonable *constructive notice,* such as the state prescribes for necessary parties to such controversies who *cannot be personally served* —has jurisdiction to *determine the domicile* and

fix the basis of distribution, and by such judgment bind all parties to the suit, notwithstanding some of them have not been personally served with process nor entered appearance.

If this be not so, and if it be necessary to the full validity of a judgment determining the domicile of a decedent, either that the *whole of his personal estate* must be *physically within the state of the forum,* or all persons having possible interests in the question must be before the Court *on personal service or voluntary appearance,* then, most obviously, the firmly established and universally recognized rule of law that the *lex domicilii* of an intestate decedent controls the distribution of his personal estate, which for that purpose is to be regarded as situated at the place of his domicile and nowhere else, must stand as a mere empty abstraction incapable of enforcement in many very important cases. For manifestly in an increasingly large number of such cases, the personal property of the decedent is *not* all physically located in any single state, and all those having possible interests cannot possibly be brought by personal service before any *one Court* anywhere. No administrator, or claimant as distributee, in such cases, could bring about the supposed essentials of jurisdiction; if the property is scattered through several states, physically, neither administrator

nor distributee can bring it into any one state; and if the persons interested are resident in several states, there is no means or procedure known to the law, State or Federal, whereby they can all be brought *by personal service* before any Court whatsoever.

Such a proceeding is not one *in rem,* against the particular physically local property which may be in the hands of the administrator; and if it be regarded as *in the nature* of such a proceeding, the *res* is not any particular property located at any particular place, but the *estate* of the deceased, which embraces all the chattel interests owned by him at his death, and, if the administrator be the domiciliary one, it is all vested in him and in contemplation of law is located at the place of administration, the domicile. In *Overby* v. *Gordon,* 177 U. S., relied on by adversaries, at page 222, the Court, speaking of the Georgia County Court appointment of an administrator, after noting that the question of domicile was important only as establishing the particular Court of Ordinary which was vested with jurisdiction to appoint, added:

> "The subject-matter or *res* upon which the power of the Court was to be exercised, was, therefore, the *estate* of the deceased."

True, there the Court was acting upon a mere appointment of an administrator, and whether such administration was domiciliary or ancillary the appointment conferred no *authority* beyond the limits of the state; and hence its effect was strictly limited to the state.

The subject-matter of this suit is rather the *status* of the intestate at his death, than his estate. The effect on the *estate* of the determination of domicile is purely *consequential.* The judgment of the Court upon *the facts* determines the domicile, and, that once determined, the *law* declares the *consequences upon the property.*

Neither is it an action *in personam,* against the distributees. No recovery is sought or obtained against them. Indeed, their *relations to the deceased or the property* are not determined by the adjudication of his domicile. Such adjudication only affords a basis upon which the law declares the *classes of persons* to share, and the relative shares of such classes. Whether the persons made parties as possible distributees are within those classes or not, is unaffected by the *judgment on domicile.* It is an undue stressing of technicalities to say that the place of domicile of a deceased person cannot be authoritatively de-

termined without the actual presence, by personal service or voluntary appearance, of every person who might, by the laws of some other state or states if he were domiciled there, be classed as his distributee. To so say, we repeat, is to say that domicile *can never be so determined* in very many cases.

It is well known that in every system of state statutes providing for bringing in by publication, warning order, and the like, persons on whom process cannot be personally served, liberal provision is made for opening the judgment or decree and making defense within periods running from two to seven years of its rendition. Both the Tennessee and Kentucky statutes contain such provisions (Shannon's Code, Secs. 6189-91; Bullitt's Ky. Code, 414-417) and similar provisions are to be found, we dare say, in the statutes of all the states. The determination of the domicile of a decedent would seem to be a subject peculiarly within the spirit and purpose of such statutes. The death of a person, it is reasonable to assume, will not long remain unknown to his relatives, nor is it unreasonable to infer some knowledge on their part respecting his property and its location, and the abodes of each other.

The proceedings for ascertaining his domicile, where it is a matter of dispute, must take place where some of these relatives reside and some of the decedent's property is situated; and they are not secret nor "done in a corner," but are taken openly and only after such means of communication to the public as experience has shown to be most reliable and effective—means universally recognized as adequate "notice" to absent persons in cases involving interests of millions in extent. Perhaps not in one such case in a hundred thousand can it go to a final judgment and the time pass for the correction of any injustice by a simple application to the Court, before every person interested will receive knowledge of it, and have opportunity to be heard.

As Judge Freeman has so well said, in the note we have quoted, many persons die leaving large and valuable property interests in different states, and these occurrences are constantly increasing; the questions thus arising are of great practical importance, personal representatives and Courts must deal with them, and (necessarily and very justly) state lines are becoming dimmer in such cases; the applicable law ought to be clearly defined, but unfortunately it is not, with respect to many of the questions growing out of such conditions. Undoubtedly it is not clearly defined on the crucial point in

the present case. Neither side is able to cite a direct or even closely analogous precedent. The conclusion must be reasoned out from fundamental principles and the necessities of our present system of government and social and industrial conditions.

We believe that the view we have presented, as the alternative of the startling results consequent upon the theory of the Court below, is sound and violative of no fundamental rule of property or procedure, that it is imperatively demanded by the conditions and tendencies of modern business in this country, and consequently that the judgment of the Court below should be *reversed.*

Respectfully,

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